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A HANDBOOK

ON THE

TAXATION OF COSTS

AS OF RIGHT

IN THE

STATE OF NEW YORK

WITH FORMS FOR VARIOUS BILLS OF COSTS

BY

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PREFACE

Very often attorneys deprive their clients and themselves of substantial sums of money as costs of an action or proceedings to which they are justly entitled. Therefore a short and concise text on the code provisions and cases together with decisions relating to them, should be of great value and assistance in taxing costs.

In the following pages it is not intended to treat the subject of costs in general, but only the taxation thereof as of right, as it comes up before the taxing officer upon the entry of judgment or otherwise.

The treatment of the subject-matter is such as to be of practical value to the attorney. Cases are used to illustrate the various rules and statutes governing the taxation of costs. The text employed, therefore, is in most instances a verbatim statement of the law as enunciated by the court rendering the decision, or an excerpt of the official headnote of the case. It is for that reason authoritative, and attorneys will find it unnecessary to refer to the books where the cases are reported.

Costs in law actions allowed to litigants are statutory, and these statutes are set forth in connection with the decisions interpreting them.

The forms are intended to be of practical value and were prepared for use in the actions specified. The lists of itemized costs and disbursements refer to the

individual statutes or laws authorizing them, and should be of great assistance to the practitioner.

Only leading cases are cited upon undisputed questions, but where there is a variance of decisions, the leading cases of both sides are discussed, and the general rule of law usually followed by a majority of the courts stated.

I want to express my appreciation of the valuable suggestions of Joseph Harvis and of the able assistance given me by Thomas J. Sullivan. Mr. Sullivan's long experience as law clerk and taxing officer of the City Court of the City of New York has been of inestimable value to me.

This book is intended to be a ready reference and is, therefore, concise and brief without loss of accuracy or comprehensiveness.

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TAXATION OF COSTS

CHAPTER I

TAXING COSTS IN GENERAL

§ 1. General appearance necessary to obtain allowance of costs.

There must be a general appearance by the attorney or an appearance in fact by the party to entitle him to the allowance of costs.

The service by an attorney of an order to show cause or notice of motion why an injunction should not be vacated is not a general appearance. Regelman *v.* The South S. T. Co., 67 Misc. 590; Paine Lumber Co. *v.* Goldbrant, 38 A. D. 68. Nor is a motion made to set aside a judgment considered a general appearance but a special appearance. Noble *v.* Crandel, 49 Hun, 474. An order extending time to answer is not equivalent to an appearance under section 421 of the Code of Civ. Pro. Krause *v.* Averill, 66 How. Pr. 97; Littauer *v.* Stern, 177 N. Y. 233.

§ 2. Statutory costs in actions at law.

Where the costs are statutory the court has no power to grant or withhold the same, and the additional words "with costs" are ineffective nor does "without costs" deprive the party of the right to costs. Jones *v.* Emery, 1 N. Y. Civ. Pro. Rep. 338; Norton *v.* Fancher, 36 N. Y. S. 1032.

Motion costs are discretionary with the court and may be allowed or disallowed; they cannot, however, exceed $10 besides disbursements under the provisions

of subdivision 3, par. 9 of section 3251 of the Code of Civil Procedure.

§ 3. Actions in equity.

In equity actions costs are discretionary with the court, except as limited in section 3230 of the Code which provides that the sum allowed should not exceed the total amount authorized by the statute. Where the judgment demands a sum of money only, section 3228 of the Code, subdivision 4 thereof, governs the statutory costs that must be allowed.

§ 4. Clerk must follow statute or order of the court in taxing costs.

Sec. 3262. Costs must be taxed by the clerk, upon the application of the party entitled thereto; except that the court may direct, that interlocutory costs, or costs in a special proceeding be taxed by a judge. The clerk must insert in the judgment or final order, the amount of the costs as taxed * * * .

Sec. 3263. Costs may be taxed, upon notice to the attorney for each adverse party, who has appeared, and is interested in reducing the amount thereof. Notice of taxation must be served, not less than five days before the taxation; unless the attorneys, serving and served with the notice, all reside, or have their offices, in the city or town, where the costs are to be taxed; in which case a notice of two days is sufficient. A copy of the bill of costs specifying the items, with the disbursements stated in detail, must be served with the notice of taxation.

In the City Court time for service of notice of taxation is set forth in section 3161, subdivision 6, which reads as follows:—

> Notice of taxation of costs not less than two days; except where all the attorneys, serving and served with the notice, reside or have their offices in the city of New York, in which case one day's notice is sufficient.

Costs are the creature of the statute and cannot be imposed except in the cases authorized by its provisions, and the clerk has no authority to tax costs except such as may be conferred upon him by statute or by an order of the court. Cassidy *v.* McFarland, 139 N. Y. 208. The authority of the clerk to tax costs upon the application of a party and without an express order of the court, is to be found in section 3262 of the Code. This applies to cases in which costs are to be inserted in a judgment or final order. Carter *v.* Builders' Construction Co., 134 A. D. 553.

§ 5. There must be a verdict, etc., before costs may be taxed.

There must be a verdict, report of a referee, or an order of the court before the clerk may tax costs. Bailey *v.* Stone, 41 How. Pr. 346.

§ 6. When clerk's taxation not disturbed.

Where the affidavit of the successful party as to disbursements stating that the amount paid is correct, true and reasonable, and actually and necessarily incurred, is met by an affidavit of the opposing party that

the amount was not necessarily paid or incurred under section 3256 of the Code of Civil Procedure, the action of the clerk in taxing the disbursements will not be disturbed. Rose *v.* Swarthout, 73 Misc. 583.

§ 7. Clerk must examine bill carefully.

It is the duty of the clerk carefully to examine the bill presented to him and to satisfy himself that all the items allowed by him are correct and legal in accordance with section 3266 of the Code. The court holding, "it was not intended to allow an obviously illegal taxation to stand because the items were not formally objected to before the clerk, since the party against whom the taxation is ordered is justified in relying on the clerk's obligation to satisfy himself, whether opposition is present or not, that the items are correct and legal." Feiber *v.* Home Silk Mills, L. J., Nov. 10, 1914; Talcott *v.* Jonasson, 42 Misc. 372.

§ 8. Power of clerk to adjourn taxation.

The clerk has power to adjourn the taxation of costs. Agricultural Insurance Co. *v.* Bean, 45 How. Pr. 444.

§ 9. Costs belong to party.

Costs awarded to a party in an action belong to the party and not to the attorney. Barry *v.* Third Ave. Railroad Co., 87 A. D. 543.

§ 10. When clerk is doubtful whether action is in tort or contract.

Where the allegations of a complaint make it doubtful whether an action is in tort or in contract, it should be

considered *ex contractu* and the costs before notice of trial taxed at $15. Lange *v.* Schile, 111 A. D. 613.

§ 11. Clerk not to dismiss taxation.

The clerk should not dismiss a taxation of costs upon the failure of a party to appear. Section 3266 of the Code places the duty upon the clerk of ascertaining and satisfying himself, as the taxing officer of the court, that all the items of the bill of costs are "correct and legal," and proper notice of retaxation having been given, it is not essential to such determination that the party should be present at the time named for such retaxation. Talcott *v.* Jonasson, 43 Misc. 372.

After the clerk once taxes costs he cannot retax them in the absence of both parties. Murdock *v.* Adams, 10 Hun, 566.

§ 12. Dismissal of taxation.

Where, however, the clerk does dismiss the retaxation because of the failure of the adverse party to appear, such costs should not again be noticed for retaxation under section 3264 of the Code. The remedy is to review the original taxation by a motion for a new taxation under section 3265 of the Code. Talcott *v.* Jonasson, 43 Misc. 372.

§ 13. Retaxation.

> Sec. 3264. Costs may also be taxed without notice. But where they are so taxed, notice of retaxation thereof must immediately afterwards be given as prescribed in the last section, by the party at whose instance they were taxed; in default

whereof, the court must, upon the application of a party entitled to notice, direct a retaxation, with costs of the motion, to be paid by the party in default * * * .

A defendant who appears is entitled to notice of retaxation of costs although he does not answer. Gilmartin *v.* Smith, 6 N. Y. Sup. Ct. 684. When, therefore, after having taxed his bill of costs without notice, the party failed to have the same noticed for retaxation, the court ordered that all the proceedings on the part of the plaintiff and the sheriff toward the collection of the judgment be stayed pending such retaxation. Fordyce *v.* Wolff, L. J. May 7th, 1915.

(a) Costs reduced on retaxation.

If costs are reduced on retaxation, the judgment is not to be changed but the amount of the reduction is to be credited on the execution. Hewitt *v.* City Mills, 136 N. Y. 211–13.

§ 14. Review of taxation by the court.

Sec. 3265. A taxation or a retaxation may be reviewed by the court, upon a motion for a new taxation. The order made upon such a motion may allow or disallow any item, objected to before the taxing officer, in which case it has the effect of a new taxation; or it may direct a new taxation before the proper officer, specifying the grounds or the proof upon which the item may be allowed or disallowed by him.

Only those papers which were before the clerk upon taxation of costs can be considered upon a motion to

correct his decision. Evans *v.* Silberman, 7 A. D. 139; Levitas *v.* Hart, 117 N. Y. S. 1027; Crotty *v.* DeDion Bouton M. Co., 102 A. D. 405. Where oral objection is made, an affidavit can be made showing what took place, but this does not allow the submission of affidavits on the merits. Lyman *v.* Young Men's Cosmopolitan Club, 38 A. D. 220. Statements of counsel on the argument which were not before the clerk on the taxation cannot be considered by the court on review of such taxation. Wolff *v.* Horn, 9 Misc. 100.

Upon a motion to review taxation, when the objection raises a question of law, the Special Term should allow or disallow the item instead of ordering a new taxation. Crossley *v.* Cobb, 37 Hun, 271. Taxation should be reviewed before costs are paid. Collomb *v.* Caldwell, 5 How. Pr. 336. The right to review may also be lost by laches. Penfield *v.* James, 4 Hun, 609. However, the party entering the judgment waives his right to review the allowance of costs. Burrows *v.* Butler, 38 Hun, 121.

§ 15. When retaxation not required after review by court.

Although the clerk may have determined the amount taxed under the wrong section of the Code, nevertheless since the court at Special Term adjudged the amount reasonable it was not necessary to order a retaxation. Vibbard *v.* Kinser Construction Co., 145 A. D. 673.

§ 16. Appeal from judgment does not prevent retaxation on the merits.

Although a substantial period such as twelve days, have elapsed since the original taxation, the court held

that the party is still entitled to have the motion for retaxation considered upon the merits, notwithstanding that during the interval an appeal from the judgment had been taken and an undertaking on appeal filed. McDermott *v.* Yvelin, 103 A. D. 418.

§ 17. Clerk must tax bills of several defendants when presented.

The clerk has no authority to determine the question whether several defendants should be limited to one bill of costs on the ground that the separate defenses were interposed by them unnecessarily so as to enhance the costs. The clerk can exercise no judicial power in granting or refusing costs. It is within the province of the court at Special Term upon motion in a proper case to make such limitation. Kaplan *v.* Olsen, 118 N. Y. S. 634.

§ 18. Only items objected to are reviewable by the court.

Upon a review of taxation only such items may be considered as were objected to before the taxing officer at time of taxation. Where there has been no objection made to any item, the party is in no position to ask for any relief. LaRosa *v.* Wilner, 54 Misc. 574; Fourteenth Street Bank *v.* Strauss, 54 Misc. 588.

On review in an Appellate Court of the clerk's taxation of costs, the defendant cannot raise the point that there was insufficient proof before the clerk, when the same was supplied at Special Term without objection on his part. Rieger *v.* Swan, 2 Misc. 467.

Upon an appeal from an order denying a motion for

a retaxation of costs, where it appears that the only objection made before the clerk on taxation was to the effect that the plaintiff was not entitled to tax costs because the main issue in the action was not disposed of and no final judgment was authorized, the court is not called upon to consider the various items embraced in the bill, but only to consider and determine whether the clerk properly taxed the bill presented. Schum *v.* City of Rochester, 16 Civ. Pro. Rep. 218.

§ 19. Judgment incomplete without inserting costs therein.

A judgment roll is not complete until the costs are inserted therein. Allen *v.* Wells, Fargo Co., 95 N. Y. S. 597.

§ 20. Stipulation as to costs.

Attorneys may stipulate the amount to be paid to referees under section 3296 of the Code of Civil Procedure, but cannot stipulate to increase the amount of costs. O'Keefe *v.* Shipherd, 23 Hun, 171.

§ 21. Two or more actions tried as one.

Where a stipulation has been entered into by the attorneys that two or more actions should be tried together or that one action is to abide the event of the other, a full bill of costs may be taxed in each case including a trial fee. Koch *v.* Koch, 1 City Court Rep. 55; Hauselt *v.* Godfrey, 3 N. Y. Civ. Pro. Rep. 116.

So held in cases on appeal although only one argument was had. Hauselt *v.* Godfrey, 3 N. Y. Civ. Pro. Rep. 116.

Similarly a full bill of costs may be taxed including a trial fee in an action which is stayed upon stipulation until the determination of another action the result of which is to be adopted as final, and judgment to be entered as if a trial had been had. Audenreid *v.* Wilson, 2 N. Y. Weekly Dig. 108.

§ 22. Only one bill of costs against several defendants.

Where two or more defendants appear by different attorneys and plaintiff recovers judgment against all of them he is entitled to tax only one bill of costs. Codding *v.* Scott, 21 N. Y. S. 473; Buell *v.* Gray, 13 How. Pr. 31; Pratt *v.* Allen, 19 How. Pr. 450.

§ 23. When defendant succeeds against one of several plaintiffs.

Where several plaintiffs unite in an action against one defendant, and some plaintiffs recover against defendant and as to the others defendant succeeds, defendant can enter judgment for costs against the latter. Knowlton *v.* Pierce, 41 How. Pr. 361.

§ 24. Interest on verdict forms no part of bill of costs.

Section 1235 of the Code of Civil Procedure provides:—

> Where final judgment is rendered for a sum of money awarded by a verdict, report, or decision, interest upon the sum awarded, from the time when the verdict was rendered, or the report or decision was made, to the time of entering judgment, must be computed by the clerk, added to the sum awarded, and included in the amount of the judgment.

Therefore the interest on a verdict from the date of its rendition should be included in the judgment and is not collected as costs on any taxation or on any order of the appellate court affirming it. It is a part of the original recovery and has no relation to costs or disbursements in the action. Matter of Smith, 161 A. D. 638, p. 642.

§ 25. Abatement of action.

Where an action brought is such that it abates with the death of the party, the costs cannot be taxed in favor of one or the other upon the death of the party. People *v.* Newcomb, 75 Misc. 258.

CHAPTER II

COSTS BEFORE NOTICE OF TRIAL

§ 26. Statutory provisions.

The plaintiff is entitled to $15 for all proceedings before notice of trial in an action specified in section 420 of the Code of Civil Procedure; in every other case $25. Sec. 3251, sub. 1, par. 1 of the Code.

§ 27. Nature of actions within section 420 of the Code.

Whether an action comes within the provisions of section 420 of the Code may be ascertained from a reading of the complaint, which must be such as to permit the clerk to enter judgment without application to the court. They are actions where the "complaint sets forth a breach of contract to pay a sum of money fixed by the terms of the contract or capable of being ascertained therefrom by computation only; or a contract to pay money received or disbursed, or the value of property delivered, or of services rendered, to or for the use of defendant or a third person; and demands judgment for a sum of money only. This includes where breach is only partial; also where the amount claimed has been reduced by payment, counterclaim or other credit."

An action for breach of contract of employment carries with it unliquidated damages and plaintiff is entitled to $25 before notice of trial. Kramer *v.* Wien, L. J. Feb. 20, 1915.

§ 28. Not taxable on demurrers.

Costs before notice of trial are not taxable upon entry of an interlocutory judgment. Turkheim *v.* Thomas, 113 A. D. 123; Louis *v.* Empire State Insurance Co., 75 Hun, 364; Hill *v.* Muller, 53 Misc. 262.

CHAPTER III

COSTS AFTER NOTICE OF TRIAL

§ 29. Item may be taxed once only.

Only one item of $15 should be allowed for costs after notice of trial. Seifter *v.* Brooklyn Heights R. R. Co., 53 A. D. 443; Kummer *v.* Christopher &c. Street Co., 33 N. Y. S. 581.

Thus where a trial was had and the jury disagreed, and at a trial held thereafter a verdict was rendered for the plaintiff which was set aside for the misconduct of the jury, and subsequently the complaint was dismissed because of plaintiff's default which was opened upon payment of costs to defendant, and a verdict having been finally rendered for plaintiff, the Court held that only $15 could be taxed for all proceedings after notice and before trial. Hudson *v.* Erie R. R. Co., 57 A. D. 98; sec. 977 of the Code.

§ 30. When more than one charge is allowed.

There are some instances where more than one charge is allowed, as where both relator and respondent served upon each other a second notice of trial. The court saying in part, "whether necessary or not, the litigants have deemed it necessary to serve a new notice of trial. There were in fact two complete trials. Where there is

in fact two trials a reasonable construction of the Code entitles the successful party to statutory costs to both trials." Distinguishing Seifter *v.* Brooklyn Heights R. R. Co., 53 A. D. 443; Rudd *v.* Cropsey, L. J. Dec. 6, 1915.

In Patrick *v.* N. Y. State Ry., 85 Misc. 473, the court holds that in counties where only one notice of trial need be served, only one item should be allowed, but in counties where a notice of trial must be filed for each term more than one item of $15 will be allowed for costs after notice of trial. In this case the trial was not completed because of a juror's illness and the case was again noticed for trial and a verdict having been rendered for plaintiff, the court allowed two fees for after notice and before trial. Section 977 of the Code.

§ 31. Effect of return of notice of trial.

Where the defendant declined to receive and accept a notice of trial served upon him and failed to file or serve a cross notice, the item of $15 costs after notice of trial was stricken out. Hammer *v.* Shreiber, L. J. Dec. 10, 1912.

§ 32. Failure to place cause on the calendar.

Service of the notice of trial must be followed by the filing of a note of issue with the clerk to have the cause placed on the calendar. Failure to do so makes the service of the notice of trial ineffective, and costs after notice of trial cannot be taxed. Hoepfner *v.* Barzlay, L. J. Sept. 30, 1902; Ranzenhoffer *v.* Barrere, L. J. Sept. 30, 1916; Tillspaugh *v.* Dick, 8 How. Pr. 33; although Roberts *v.* Aden, 2 City Court Rep. 302, holds that the item should properly be taxed.

CHAPTER IV

TRIAL FEE

§ 33. In general.

Section 3251, sub. 3, par. 5 of the Code of Civil Procedure allows $30 as a trial fee for the trial of an issue of fact. The general rule is that a trial fee is allowed for each trial whether such trial results in a determination of the question, or prove abortive for any reason. Dame *v.* Maynard, 139 A. D. 385.

§ 34. On dismissal of action.

Where a cause is at issue on an issue of fact and is regularly noticed for trial and placed on the calendar

and, when reached in its regular order, the complaint is dismissed on the failure of the plaintiff to appear, there has been a trial of the action, and a trial fee should be taxed. Pagano *v.* Lacobelli, L. J. Jan. 22, 1914; Dodd *v.* Curry, 4 How. Pr. 123; VanGelden *v.* Hallenbeck, 2 N. Y. S. 252.

Likewise where a cause of action comes regularly on the calendar for trial at a Trial Term, and is dismissed for failure of plaintiff to appear, and default is opened without terms, and a second trial results in a dismissal of the complaint, defendant is entitled to two trial fees. Cole *v.* Lowery, 23 N. Y. S. 674.

§ 35. On discontinuance of action.

Where an order is entered discontinuing an action before it appears on the day calendar, upon payment of costs, a trial fee cannot be taxed. Sutphen *v.* Lash, 10 Hun, 120; Moline Auto Co. *v.* DeLamater-B. Auto. Co., L. J. Mar. 31, 1915.

§ 36. Cause on short cause calendar sent back to general calendar.

Where a party has caused an action to be placed on the short cause calendar and after a partial trial thereof, it is sent back to the general calendar, the same party, if successful on the second trial, cannot tax two trial fees because the court will not allow the adversary to be charged with cost of a trial put on by the mistake of the other party. But if the unsuccessful party has brought the cause on for trial on the short cause calendar, a trial fee is properly taxable. Browning *v.* Brokaw, 114 A. D. 104. This case overrules Gilroy *v.* Badger,

58 N. Y. S. 1106. "There can be no reasonable ground for dispute that the rule which permits the taxation of a trial fee for a mistrial applies only to cases where the party finally successful was not responsible for the abortive character of the proceedings." Fink *v.* Stachelberg, 86 N. Y. S. 20.

§ 37. Mistrial.

Likewise where the plaintiff was allowed to withdraw a juror, thus producing a mistrial, so that he might amend his pleading, he is not entitled upon recovery of a judgment on the second trial to have taxed against the defendant the costs after notice and before trial, and the trial fee of the first trial. Otherwise if the defendant were successful in the action. Norton *v.* Erie R. R. Co., 83 Misc. 159.

§ 38. Disagreement of jury.

A trial fee is taxable upon the disagreement of a jury because a trial without a verdict is still a trial, the work of counsel is just as great whether the jury agree or not. Ellsworth *v.* Gooding, 8 How. Pr. 1; Hamilton *v.* Butler, 19 Abb. Pr. 446; Mott *v.* Consumers Ice Co., 8 Daly, 244.

§ 39. Withdrawal of juror.

When a trial has been duly commenced and the court has allowed the withdrawal of a juror and the discontinuance of the trial, it is considered a trial within the Code for the purpose of taxing a trial fee for the party finally successful at the trial. Block *v.* Linsley, 40 Misc. 184.

§ 40. Inquest.

A trial fee is allowed the plaintiff upon an inquest under the section of the Code which provides for a trial fee of an issue of fact. Weiss et al. *v.* Morrel et al., 7 Misc. 541; Hawley *v.* Davis, 5 Hun, 642.

§ 41. Cause sent to referee.

Where a case appears before a court and is then sent to a referee, such reference is considered as a continuation of the trial and only one trial fee is allowed. Boissevain *v.* Pope, L. J. Aug. 28, 1909; Price *v.* Price, 61 Hun, 604.

A trial fee will not be allowed when a case is stopped during a hearing and then sent to a referee. Third National Bank of Syracuse *v.* McKinstry, 2 Hun, 443.

(a) Reference to admeasure dower.

Nor will a reference to admeasure dower be considered a trial within section 3251 of the Code and therefore the costs as of a trial before such referee cannot be taxed. Price *v.* Price, 61 Hun, 604.

Nor should a trial fee be allowed where a reference is had merely auxiliary to an application for judgment on default in an action to foreclose a tax lien. City Tax Lien Co. *v.* Murray, 91 Misc. 119.

(b) Reference cancelled.

However an allowance of a trial fee before a referee will be made, although the reference is cancelled. Where therefore a referee having heard the case referred to him, delayed his decision beyond the time allowed him under section 1019 of the Code, a motion

was made to cancel the reference which was granted and a trial fee was allowed, the court holding that "there was nothing in the facts to take it out of the general rule that a trial fee was allowed for each trial, whether such trial results in a determination of the question or prove abortive for any cause." Dame *v.* Maynard, 139 A. D. 385.

§ 42. Stipulation that costs are to be the same as of another trial.

Where a stipulation has been entered into by the attorneys that judgment should be entered with costs upon the result of another trial "the same as if a trial had been had," the successful party is entitled to a trial fee. Audenreid *v.* Wilson, 2 Weekly Digest, 108.

§ 43. Additional costs for a trial lasting more than two days.

Additional costs of $10 is allowed for a trial lasting more than two days under section 3251, sub. 3, par. 5, of the Code of Civil Procedure. So that where each of three trials had in an action lasted more than two days, ten dollars was allowed in addition to the thirty dollars trial fee in each of the three trials. Hudson *v.* Erie R. R. Co., 57 A. D. 98.

§ 44. What constitutes period of trial.

The trial begins within the meaning of the section of the Code, when the judge to whom the cause is assigned actually directs the commencement of the proceedings which constitutes the opening of the trial. The time of waiting to become actually engaged is not to be

included, nor is the time after the submission of the case to the court or jury for decision within the meaning of the section. Egan *v.* Interborough Rapid Transit Co., L. J. June 12, 1915.

Where the jury was examined and then adjourned because the trial counsel was not present, and subsequent to that the trial lasted two days, the court held that the trial occupied three days. Goodkind *v.* Metropolitan Street Ry. Co., L. J. June 11, 1904. However, the fact that counsel was given time to submit briefs should not be considered as added to the time of the trial to make it more than two days to entitle the successful party to additional costs. Evans *v.* Ferguson, 10 Civ. Pro. Rep. 57. Nor where the trial of an action closed at the end of the second day and the jury returned a sealed verdict the following day, the court held there that the trial lasted only two days and that additional costs of ten dollars could not be taxed. Washburne *v.* Oliver, 62 How. Pr. 482.

CHAPTER V

TERM FEES

§ 45. Statutory provisions.

The statutory provisions relating to the allowance of term fees is contained in section 3251, subdivision 3, paragraph 10, which reads: —

> For one term of the City Court of the city of New York, at which the case is necessarily on the calendar, and for each trial term or special term, of the Supreme Court, or any County Court, not exceeding five, at which the cause is necessarily on the calendar, excluding the term at which it is tried, or otherwise finally disposed of, ten dollars.

Paragraph 15 of the same subdivision and section reads:—

> For each term of the Appellate Division, not exceeding five, of the Supreme Court, at which the cause is necessarily on the calendar, excluding the term at which it is argued, or otherwise finally disposed of, ten dollars.

Paragraph 4 of subdivision 5 of same section reads:—

> For each term (of Court of Appeals), not exceeding ten, at which the cause is on the calendar, excluding the term at which it is argued, or otherwise finally disposed of, ten dollars.

§ 46. Cause must be necessarily on the calendar.

To entitle a party to term fees the cause must be necessarily on the calendar. Deyo *v.* Morss, 21 Misc. 497.

A cause is necessarily on the calendar when it has been noticed for trial and placed on the calendar ready to be tried when reached. Sipperly *v.* Warner, 9 How. Pr. 332.

Therefore, unless the cause is in a condition to be tried it is not necessarily on the calendar and no term fee can be allowed. Bowen *v.* Sweeney, 66 Hun, 42.

Nor is a case properly on the calendar until all the parties have been served and all of them have answered. Bowen *v.* Sweeney, 66 Hun, 42.

A cause is not considered necessarily on the calendar where judgment could have been obtained without noticing it for trial and placing it on the calendar. A

term fee in that event will not be allowed. Candee *v.* Ogilvie, 5 Duer, 658.

But when a party notices a case for trial and places the same on the calendar he is estopped from denying that the case is necessarily on the calendar. Hagar *v.* Danforth, 8 How. Pr. 448.

§ 47. Stay of proceedings.

Where a party procures a stay of proceedings until the return of a commission, it was held that he was not entitled to term fees while the stay was in effect. Shufelt *v.* Power, 3 How. Pr. 89. Nor will any term fees be allowed to a successful party in an action who, without the consent of the other party, procures a postponement of the case for his own benefit. Sipperly *v.* Warner, 9 How. Pr. 332.

§ 48. Term fees allowed although notice was filed by adversary.

Where an action has been noticed for trial, the party finally successful is entitled to term fees, although the notice of trial was given by the opponent. Andrews *v.* Schnitzler, 48 Sup. Ct. 173. But in an action against two defendants, where the case is noticed and put on by one of the defendants only as to whom the complaint is dismissed, the other defendant is not entitled to a term fee on obtaining a dismissal. Tillspaugh *v.* Dick, 8 How. Pr. 33.

Where a demurrer is noticed for argument on the general calendar and is then ordered to be heard at the Special Term for the same month, only one term fee can be charged. Comstock *v.* Halleck, 4 Sandf. 671.

§ 49. Fee for one term only in the City Court.

In the City Court of the City of New York only one term fee is allowed. So held on a motion at Special Term for a retaxation disallowing ten dollars term fee because the case was tried at the same term it was placed on the calendar. Wolkoff *v.* Silverstein, L. J. Dec. 10, 1913.

§ 50. No costs allowed for term at which cause is tried or disposed of.

The term fee will be taxed only for the term at which the case is necessarily on the calendar, excluding the term at which it is tried or otherwise at which it is finally disposed of. So that where the case is discontinued at the first term at which the case has been on the calendar upon payment of taxable costs to date, no term fee is taxable. Mossein *v.* Empire State Surety Co., 117 A. D. 782.

§ 51. Effect of amendment of pleadings on term fees.

An amendment of a pleading changes the old issues and creates new ones. So that where a case had been on the calendar and the defendant pursuant to an order served an amended answer, the court held that this destroyed the old issue, and inasmuch as the case was not on the calendar for more than one term since the creation of the new issue, no term fee should be allowed. Isaacs *v.* Kobre, L. J. March 6, 1914. For the same reason four months term fees were disallowed although the case was on the calendar four months, exclusive of the term at which it was disposed of, because just before the case was referred the plaintiff served an

amended complaint. The old issue was thereupon destroyed and the term fees that had previously accrued could not be allowed. Herzfeld *v.* Reinich, 57 A. D. 669; Mossein *v.* Empire State Surety Co., 117 A. D. 782.

§ 52. Adjournments to other terms on consent.

The prevailing party in an action is entitled to costs of the terms other than that at which the cause was tried although the cause was continued from term to term on consent of the parties. Deyo *v.* Morss et al., 21 Misc. 497.

§ 53. No term fee allowed in Appellate Term.

The Code of Civil Procedure does not provide for the allowance of term fees at the Appellate Term and the court cannot therefore allow any such costs. Feiber *v.* Home Silk Mills, L. J. Nov. 10, 1914. Cassidy *v.* McFarland, 139 N. Y. 208.

The successful party is entitled to tax the term fees although he did not notice the cause for trial. Vandever *v.* Warren, 11 N. Y. Civ. Pro. Rep. 319.

§ 54. Term fees in other appellate courts.

No term fee is allowable on appeal from an order. Ennis *v.* Wilder, 14 Weekly Dig. 211.

Only one term fee can be charged for each year in the Court of Appeals.

Term fees are not taxable for terms during which an appeal is improperly on the calendar. When therefore the findings have not been properly made and signed, the case is not in a condition for the consideration of the court and therefore improperly on the calendar.

Nobis *v.* Pollock, 18 Civ. Pro. Rep. 1. So also when the case is not printed or ready for argument, especially when put there by the party whose duty it is to print the case. Van Gelder *v.* Hallenbeck, 18 State Rep. 19.

Where an appeal is placed on the calendar, not for argument, but to have it dismissed, a term fee cannot be taxed. Newhall *v.* Appleton, 4 Mo. Law Bull. 6.

CHAPTER VI

DISMISSAL OF COMPLAINT

§ 55. Costs are statutory.

The right to costs on dismissal of complaint is statutory and not within the discretion of the court. The judgment is a final one and terminates the action and therefore costs should be allowed. Van Vliet *v.* Kanter, 139 A. D. 602.

§ 56. Trial fee allowed.

A trial fee will be allowed where a cause has been regularly noticed for trial and placed on the calendar and, when reached, is dismissed on failure of the plaintiff to appear on trial. There has been a trial of the action for the purpose of taxation. Cole *v.* Lowery, 23 N. Y. S. 674; Pagano *v.* Lacobelli, L. J. Jan. 22, 1914.

§ 57. Costs to each of several defendants.

Where several defendants appeared by separate attorneys and each moved separately to dismiss complaint which was granted, each defendant is entitled to a separate bill of costs. Jacobs *v.* Feinstein, 133 A. D. 416.

§ 58. Dismissal as to one of several defendants.

Where complaint is dismissed as to one defendant who answers separately, such defendant is not entitled

to costs as a matter of course, provided the plaintiff is entitled to costs as against one or more defendants. The allowance of costs is in the discretion of the court. Code section 3229. Ljungquist *v.* Hartmetz, 54 Misc. 87. So held in a Special Term decision where the court said: "This is peculiarly a case in which the court should exercise the discretion conferred by section 3229 of the Code and withhold costs from the two defendants as to whom the trial terminated favorably. The motion to direct the clerk to tax costs is denied." Kesner *v.* Greenfield, L. J. March 31, 1915.

CHAPTER VII

DISCONTINUANCE OF ACTION

§ 59. Costs to date are statutory.

The defendant is entitled to all costs to date upon the plaintiff's discontinuance of his action. These costs are not discretionary with the court but are regulated by statute. Claflin *v.* Robinson, 6 N. Y. S. 430; Himberg *v.* Rogers, 40 Misc. 190.

§ 60. Costs before and after notice of trial allowed.

Where therefore an action is discontinued after the issues were joined and cause noticed for trial defendant is entitled to the sum of twenty-five dollars as costs for before notice of trial and after notice of trial. Rinaldo *v.* Cowen, 22 N. Y. S. 1075.

§ 61. No trial fee nor disbursements allowed.

No trial fee, however, will be allowed the defendant although the action had been noticed for trial and placed

on the calendar and just as it was about to be moved for trial an order was entered discontinuing the action. Sutphen *v.* Lash, 10 Hun, 120.

Nor will disbursements for the entry of judgment, filing a transcript or for issuing execution, be allowed to be taxed under an order allowing the plaintiff to discontinue the action upon payment of costs. Studwell *v.* Baxter, 33 Hun, 331.

§ 62. Where trial fee may be allowed.

A trial fee may be allowed the defendant where the plaintiff discontinues his cause of action when it is marked ready for trial after it had appeared on the day calendar and answered ready prior to the date of discontinuance. Moline Auto. Co. *v.* De Lamater-B. Auto. Co., L. J. March 31, 1915; Duprey *v.* Phœnix, 1 Abb. N. C. 133, note.

§ 63. When no term fee allowed.

Where a case is discontinued at the same term at which the case has been placed on the calendar upon payment of taxable costs, no term fee is taxable. Evans *v.* Silberman, 7 A. D. 139.

§ 64. When allowed without costs.

An order of discontinuance may be allowed without costs if entered before appearance of defendant. The fact that defendant retained an attorney is not sufficient. Averill *v.* Patterson, 10 N. Y. 500; Hallet *v.* Hallet, 10 Misc. 304; Schenck *v.* Fancher, 14 How. Pr. 95.

But an unexpected decision of the Court of Appeals

which renders further prosecution of the case useless is no ground for exemption from costs which accrued in the action. Agar *v.* Tibbets, 56 Hun, 272.

§ 65. Consolidation of actions.

By consolidating two actions the original actions are discontinued and only the consolidated action remains, and the successful party will be entitled to tax only the costs of the consolidated action, unless the right to tax the costs of the discontinued action is reserved in the order directing the consolidation. Hicox *v.* New Yorker Staats Zeitung, 23 N. Y. Civ. Pro. Rep. 87.

§ 66. No judgment for costs to be entered on discontinuance of action.

On motion for leave to discontinue either at Special Term or Trial Term, an absolute order of discontinuance is unauthorized and a judgment for such costs should not be entered. The court can only impose costs, but the plaintiff is free either to discontinue and pay costs, or go on with the action. Hyde *v.* Anderson, 112 A. D. 76; Anderson *v.* A. E. Norton, Inc., 158 N. Y. S. 152.

CHAPTER VIII

DEMURRERS AND INTERLOCUTORY JUDGMENTS

§ 67. Statutory provisions.

Section 3251, subdivision 3, paragraph 4, provides: "For the trial of an issue of law, twenty dollars."

Section 3232 provides:—

> Where an issue of law and an issue of fact are joined, between the same parties to the same action, and the issue of fact remains undisposed of, when an interlocutory judgment is rendered upon the issue of law; the interlocutory judgment may, in the discretion of the court, deny costs to either party, or award costs to the prevailing party, either absolutely, or to abide the event of the trial of the issue of fact.

§ 68. When entitled to allowance of costs.

A party is not entitled to costs on demurrer when he succeeds only as to one of the grounds and fails as to the others. Petrakion *v.* Arbeely, 23 Civ. Pro. Rep. 183. Nor are costs allowed to either party when the demurrer is sustained only in part and overruled in part. Benner *v.* Benner, 12 N. Y. S. 472.

The right to costs is absolute when the demurrer to the pleading is disposed of, except as provided for in section 3232 of the Code. Tallmann *v.* Bernhard, 75 Hun, 30.

Costs of a motion to overrule a demurrer cannot be charged in addition to the costs of a trial of an issue of law on the disposition of the demurrer. McWilliams *v.* Dayton, 27 Misc. 828.

§ 69. When nominal damages are demanded.

Where the demand in a complaint is for nominal damages, the costs allowed on the overruling of a demurrer by defendant to the complaint, are taxable by defendant under section 3228, subdivisions 4 and 5, and section 3229 of the Code, providing that where plaintiff recovers less than fifty dollars defendant is entitled to tax costs. Roome *v.* Jennings, 3 Misc. 413.

§ 70. As a contested motion.

A demurrer may be brought on for hearing either as a contested motion or as a trial of an issue of law.

Where it is brought on as a contested motion under section 976 of the Code or for judgment on the pleadings under section 547 of the Code, only $10 motion costs should be allowed. When final judgment is entered costs

before notice of trial and motion costs are taxable. Kramer *v.* Barth, 79 Misc. 80. Where a demurrer is disposed of on motion for judgment on the pleadings under section 547 of the Code, costs after notice of trial and a trial fee are not taxable. Singer Mfg. Co. *v.* Granite Spring W. Co., 67 Misc. 575; Keyes *v.* Lestershire Heights Ry. Co., 158 N. Y. S. 617.

§ 71. As a trial of an issue of law.

When a demurrer comes on to be heard as an issue of law and the court determines that the successful party is entitled to costs such costs are statutory as provided for in section 3251 of the Code, and the court has no power to fix any different amount such as $10. Vogt *v.* Oettinger, 88 Hun, 52.

So that when a demurrer to the entire complaint in a common-law action is sustained and leave is given to the plaintiff to amend, the defendant is entitled as a matter of course on entering the interlocutory judgment, to $20 costs for trial of an issue of law and $15 for all proceedings after notice of trial (section 3232 of Code). Turkheim *v.* Thomas, 113 A. D. 123. Costs before notice of trial is not taxable. Louis *v.* Empire State Insurance Co., 75 Hun, 364.

§ 72. When demurrer is sustained or overruled in whole.

Where an order is made sustaining or overruling a demurrer to the whole complaint in a common-law action the successful party is entitled to costs after notice of trial, trial fee and disbursements as a matter of law. Marsh *v.* Graham, 19 Misc. 263; Garret *v.* Wood, 61 A. D. 294.

Where the demurrer to complaint is sustained, the defendant is entitled to costs, and if there are several defendants not united in interest, each is entitled to a separate bill of costs, as of right. Olifier *v.* Belmont, 24 Civ. Pro. Rep. 408.

But such costs do not include costs before notice of trial, nor fees for entering judgment, satisfaction piece, transcript and filing of judgment, or sheriff's fees on execution. Thompson *v.* Stanley, 22 Civ. Pro. Rep. 348.

§ 73. Demurrer to one of several defenses or counterclaims.

Where there is a demurrer to one of several defenses only twenty dollars as an argument fee is allowable. Full costs will not be allowed because the entire defense is not disposed of. Basso *v.* Basso, 19 Abb. N. C. 173. Similarly upon an allowance of a demurrer to one of several counterclaims with leave to amend on payment of costs, only twenty dollars for the trial of an issue of law should be allowed, full costs to be taxed on the final determination of the action. Kniering *v.* Lennon, 3 Misc. 247.

Where a demurrer is interposed to the entire complaint or answer with leave to amend and the party elects not to avail itself of the privilege and fails to amend, final judgment should be entered for full costs. Garret *v.* Wood, 61 A. D. 294.

§ 74. On entry of interlocutory judgment.

Upon entry of an interlocutory judgment the successful party is entitled to tax costs after notice of trial, a

trial fee of an issue of law and disbursements. Costs before notice of trial is not allowed. Hill v. Muller, 53 Misc. 262; Garret *v.* Wood, 61 A. D. 294. Similarly on sustaining a demurrer to an answer, plaintiff is not entitled to costs of proceedings before notice of trial. Penfield *v.* City of New York et al., 102 N. Y. S. 784.

On an affirmance of an interlocutory judgment on a demurrer, the successful party is entitled to the taxation of $40 only for argument of appeal. Hill *v.* Muller et al., 53 Misc. 262.

§ 75. Disbursements.

Disbursements allowed in an interlocutory judgment are those connected with the argument and entry of judgment, but does not include service of summons and complaint and sheriff's fees on execution. Louis *v.* Empire State Insurance Co., 75 Hun, 364; Thompson *v.* Stanley, 22 Civ. Pro. Rep. 348.

§ 76. Full bill allowed on failure to plead over.

Where a demurrer has been either sustained or overruled and leave having been granted to plead over and the party fails to do so, final judgment may be entered with a full bill of costs. Crasto *v.* White, 52 Hun, 473; Garret *v.* Wood, 61 A. D. 294.

§ 77. Costs of interlocutory judgment contained in final judgment.

Although the costs awarded in an interlocutory judgment are absolute, they are not collectible by execution (section 3232 and section 779 of the Code). The judg-

ment, therefore, should not provide that execution should be issued for their collection. They should be included in the final judgment if the party is finally successful, or set off in the final judgment if the party is unsuccessful. Cassvoy *v.* Pattison, 101 A. D. 130.

CHAPTER IX

MOTIONS AND SPECIAL PROCEEDINGS

§ 78. Motion costs allowed in the discretion of the court.

It is within the discretion of the court either to allow or disallow motion costs. The amount allowed is fixed by statute, in section 3251, subdivision 3, par. 9, of the Code of Civil Procedure, wherein it provides that the sum allowed is to be "fixed by the court or judge not exceeding $10 besides necessary disbursements for printing and referee's fees."

But costs on a motion for a new trial on newly discovered evidence is regulated by subdivision 4, of section 3251 of the Code, and is the same as costs on an appeal.

Motion costs may be allowed to abide the event. The allowance thereof must be set forth in the order.

§ 79. When "with costs" does not include disbursements.

Section 3236 of the Code of Civil Procedure provides that "Costs upon a motion in an action, where the costs are not specially regulated in this act, or upon a reference

made may be awarded, * * * in the discretion of the court or judge." A motion is an application in an action, and motion costs are entirely independent of those allowed in an action upon final judgment. Subdivision 3, of section 3251 of the Code limits the amount of motion costs that may be allowed. Matter of Peterson, 94 A. D. 143.

An order that is merely incidental to a proceeding is not a final order and costs allowed therein are motion costs within section 3236 and only $10 motion costs are allowable unless the court expressly awards disbursements. Matter of Babcock, 86 A. D. 563. Similarly on an order of reference under section 3236, the utmost that could be allowed is $10 and an allowance for printing. "While the court was not required to fix the amount it could have directed the clerk to tax them. But without such a direction the clerk could not tax them." Cassidy *v.* McFarland, 139 N. Y. 201. So also on motion made, an order appointing a commission does not determine the rights of the parties or end the proceeding and therefore is not a final order. It is a decision of a motion made in the progress of the proceeding and the costs awarded are motion costs and not those in a special proceeding under section 3240 of the Code. Matter of VanDusen, 132 A. D. 592.

§ 80. Costs in special proceedings.

Section 3240 reads:

> Costs in a special proceeding, instituted in a court of record, or upon an appeal in a special proceeding taken to a court of record, where the costs thereof are not specially regulated in this act, may be

awarded to a party in the discretion of the court, at the rates allowed for similar services, in an action brought in the same court, or an appeal from a judgment taken to the same court and in like manner.

§ 81. Must be a final decree or order in special proceedings.

This section applies to final orders in special proceedings, and the costs are to be ascertained by taxation. It is not necessary to specify costs and disbursements, as under section 3256 costs carries disbursements with it. Matter of Babcock, 86 A. D. 563.

An award of costs upon a judgment or upon a final decree or order in special proceedings carries taxable disbursements. Matter of Perry, 131 A. D. 284; Matter of Bensel, 143 A. D. 962.

§ 82. When section 3240 is applicable.

Although a statute is silent as to costs in proceedings for opening, extending, and grading streets, there is authority under section 3240 of the Code to award costs to property owners upon confirmation of the report by the commissioners. Matter of School Street Nos. 1–2, 162 A. D. 158. The section applies similarly in proceedings for the recovery of damages resulting from changing the grade of streets. Bley *v.* Village of Hamburg, 84 A. D. 23; Matter of Brady, 145 A. D. 49.

In proceedings to acquire title to land instituted under the general Railroad Act, the court may in its discretion under section 3240 of the Code, award costs to any party at the rates allowed for similar services in an action brought in that court. Where no issue had been joined

and no question of fact had been raised or tried, the court's disallowance of a trial fee was correct. Matter of New York L. & W. R. Co., 26 Hun, 592.

Where the compensation awarded to a landowner by commissioners in condemnation proceedings under section 3372 of the Code, exceeds the amount offered by the corporation, the landowner is entitled to same costs as a successful defendant in the Supreme Court under section 3251 of the Code, viz.:—$10 before notice of trial, $15 after notice of trial, $30 trial fee, and for a trial occupying more than two days $10 additional. Matter of Brooklyn Union El. R. R. Co., 176 N. Y. 213.

Section 3240 applies also where a proceeding is instituted to have a liquor tax certificate revoked, and an answer is interposed. Matter of Young, 66 Misc. 216. Where a warrant of seizure was executed. Farley *v.* 16 Bottles of Champagne, 153 A. D. 592. In a proceeding to remove a commissioner by the mayor. O'Neil *v.* Mansfield, 47 Misc. 516. So also in a proceeding to distribute surplus moneys arising from a sale upon a foreclosure of a mortgage. Syracuse Savings Bank *v.* Stokes, 71 Misc. 508. Not, however, in a proceeding for the sale of infant's property which is regulated by section 2348. Matter of Molinari, 82 Misc. 663. A decree of a surrogate vacating or setting aside the assessment of a transfer tax made by him is a final order in a special proceeding and the costs awarded are the same as on an appeal from a judgment including costs and disbursements. Matter of Babcock, 86 A. D. 563.

CHAPTER X

COSTS FOR PROCEEDINGS AFTER THE GRANTING OF AND BEFORE NEW TRIAL

§ 83. Statutory provisions.

Under the provisions of section 3251, subdivision 3, par. 10, of the Code, "where a new trial is had pursuant to an order granting the same," $25 is allowed for all proceedings after the granting thereof, and before the new trial.

§ 84. Where verdict is set aside and new trial ordered.

Upon the rendition of a verdict for the plaintiff at the close of the trial, the defendant moved without opposition by the plaintiff, to set the verdict aside which was granted. On the second trial a verdict was again rendered for the plaintiff. The court held that the plaintiff was entitled to costs of both trials as well as to $25 as provided for in section 3251, subdivision 3, of the Code, where a new trial is had pursuant to an order granting the same. Capozzi v. Bulkley, 156 A. D. 55.

§ 85. Verdict set aside because of misconduct of jury.

Where a jury brings in a verdict and the same is set aside because of the misconduct of the jury, and a new trial is ordered by the court, the successful party is entitled to tax $25 costs for proceedings after the granting of and before a new trial. Hudson v. Erie R. R. Co., 57 A. D. 98.

§ 86. Reversal of judgment by appellate court.

A judgment having been reversed by the Appellate Term leave to appeal to the Appellate Division was obtained and upon stipulation the appellate court heard the argument, and after modifying the original judgment, judgment absolute was given to the plaintiff. The clerk on taxation of bill of costs allowed $25 because the Appellate Term had reversed the judgment and ordered a new trial. On motion to review the clerk's taxation, the court at Special Term of the City Court held that "The costs as taxed by the clerk have the unqualified approval of the court." H. G. Vogel Co. *v.* Reinhardt, L. J. Dec. 1st, 1915.

§ 87. On opening an inquest no costs allowed.

The trial of an action after opening an inquest, is not a new trial within the meaning of the section of the Code. Wessels *v.* Carr, 22 Abb. N. C. 464.

§ 88. Nor after a disagreement of jury.

A new trial ordered after a disagreement of a jury is not an order within the provisions of the section allowing costs. Hamilton *v.* Wentworth, 27 N. Y. Sup. Ct. Rep. 654. Held *contra* in Kummer *v.* Christopher T. Street Co., 33 N. Y. S. 581. However the court in Hudson *v.*

Erie R. R. Co., 57 A. D. 98, *seems* to be in accord with Hamilton *v.* Wentworth, *supra.*

§ 89. Restoring case to day calendar.

An order restoring a cause to the day calendar for trial at a subsequent term after the withdrawal of a juror, is not considered an allowance of a new trial "pursuant to an order of the court granting the same" so as to tax $25 costs for proceedings after the granting of and before a new trial. Bloch *v.* Linsley, 40 Misc. 184.

§ 90. Item taxable more than once.

There seems to be no limit to the number of times this item may be taxed. It depends solely on the number of new trials that were had "pursuant to an order of the court" granting them. Levine *v.* Klein, 66 Misc. 571.

CHAPTER XI

NEW TRIAL UPON NEWLY DISCOVERED EVIDENCE

§ 91. Costs allowed are the same as on an appeal.

Upon a motion for a new trial upon a case, or an application for judgment on a special verdict, either party is entitled to the same sum as upon an appeal: $20 before argument and $40 for argument. Section 3251, subdivision 4 of the Code.

§ 92. Motion is made on a case.

Where a motion is made for a new trial upon newly discovered evidence, a case must be made and settled under section 997 of the Code, and where the motion is denied, the successful party is entitled to the same costs as on an appeal. Davis *v.* Grand Rapids Fire Ins. Co., 5 A. D. 36.

§ 93. What a case consists of.

A motion is made on a case where it is made on "the settled case herein" and on affidavits and papers theretofore served. Perkins *v.* Brainard Quarry Co., 11 Misc. 337.

§ 94. Entitled to costs of motion in addition to costs on appeal from judgment.

The prevailing party on a motion of this kind is entitled to full costs of appeal although he is also entitled to full costs on a simultaneous appeal from the judgment. Pease *v.* Penn. R. R. Co., 137 A. D. 459, aff'd in 203 N. Y. 573.

§ 95. Appeal costs follow as a matter of course.

Where upon an appeal from an order of the City Court granting plaintiff a new trial on the ground of newly discovered evidence, the order is reversed with costs and disbursements, the defendants are entitled as a matter of course to tax $20 before argument and $40 for argument. Brennan *v.* Joline, 70 Misc. 537.

CHAPTER XII

TAXATION OF COSTS PREVIOUSLY PAID AS TERMS

§ 96. Costs paid as terms on amendment of pleadings cannot be taxed again.

The courts are at variance as to whether costs that have been paid by a party under an order permitting an amendment to the pleadings upon payment of taxable costs to date, can again be taxed by the party finally successful in the action.

In Cahill *v.* Mayor, it was held that where costs are awarded against a party as a condition of leave to file an amended pleading, the party receiving the costs cannot again tax the same on finally succeeding in the action. Cahill *v.* Mayor, 50 A. D. 276. Nor can either party again tax the same items of costs that have been paid by the defendant pursuant to an order to pay costs to date for leave granted to him to amend his pleading. The order is a final adjudication that the items belong to the plaintiff. Marx *v.* Gross, 22 N. Y. S. 387; Seneca National Bank *v.* Hawley, 32 Hun, 288. The theory is

that the imposition of costs on the granting of a favor constituted an adjudication that such items of costs belong to the party to whom they are directed to be paid and when once paid cannot again be taxed by either party.

§ 97. Items of costs paid as terms allowed to be taxed again by successful party.

The decisions more generally followed, however, hold that the costs allowed are to be considered merely as a measure of compensation awarded to a party for his additional labor, and delay because of the favor granted to his adversary. So that where the plaintiff as a condition of being allowed to amend his complaint before trial is required to pay costs up to the time of his application, he must be allowed to tax again such *items* if he afterwards succeeds in obtaining judgment. Dovale *v.* Ackerman, 24 Abb. N. C. 214; Havemeyer *v.* Havemeyer, 48 Superior Ct. 104.

The reasoning is well stated in Havemeyer *v.* Havemeyer (*supra*), "The order having been made during the pendency of the issues and the exercise of the discretion of the court, and in respect to a matter of pleading merely, it contemplated not a final and complete disposition of all the costs that had accrued up to that time as such, but a compensation to the plaintiffs for the amendment, to be measured by the taxable costs to which they would have been entitled in case then and there they had succeeded."

Likewise it was held that the payment of costs paid by defendant as a condition of being allowed to amend his answer did not preclude the plaintiff who was finally

successful from again taxing such items of costs. Starr Cash Car Co. *v.* Reinhardt, 6 Misc. 365; Cohn *v.* Huson, 3 How. Pr. N. S. 130.

Thus also in an action where the defendant as a condition for leave to amend his answer, was ordered to pay to the plaintiff costs and disbursements to date, and has paid the same, the plaintiff, although successful at the trial, was allowed again to tax the costs. The court held that when the amended answer was allowed the issues presented were changed and from that time on the plaintiff was compelled to proceed as if he had at that time instituted a new action. For that reason he was entitled to tax the items of costs before notice of trial, costs after notice of trial, and a term fee as well as costs of all subsequent proceedings. As to disbursements, however, the court disallowed a retaxation of them. Disbursements are allowed simply for reimbursing the successful party for moneys expended by him, and when once paid cannot again be taxed. Grant *v.* Pratt & Lambert, 110 A. D. 149.

This case was followed in an action that came on for trial on three different occasions. After the first trial the plaintiff moved to amend his answer. The motion was granted on payment of taxable costs to date. Costs were paid and complaint amended. At the second trial the cause was sent from the short cause calendar back to the general calendar, and on the third trial the case was dismissed. The court held "that notwithstanding the fact that the costs have once been paid, the clerk erred in refusing again to tax the same upon the defendant finally succeeding in the action." The court allowed $10 costs before notice of trial, $10 term fees, and $15

after notice of trial. H. G. Vogel Co. *v.* Reinhardt, 89 Misc. 606.

§ 98. Where terms allowed is an amount equal to costs.

It will be noticed that the costs allowed to be taxed over again were the *items* of costs allowed by statute to the successful party. These decisions have no reference to the allowance of an amount equal to costs or an allowance of a lump sum. Where the payment allowed for a favor granted is a sum equal to the costs to date, without being designated as such, the party receiving them may tax full costs in the event of his success in the action. Schmidt *v.* Mackie, 9 Weekly Dig. 288.

In Lennon *v.* McIntosh, 19 Abb. N. C. 175, the defendant was permitted to open default taken at Trial Term on payment of $20 costs and certain witness fees. The plaintiff on recovery on a subsequent trial was entitled to tax a full bill of costs without deducting the $20 paid to open the default.

§ 99. Payment of costs on opening default.

The same rule does not apply to the taxation of costs ordered to be paid on opening a default and allowing a party to come in and defend. There is no change of issue as is occasioned by an amendment of pleadings. The court merely allows the party to come in and try the issues already raised by the pleadings. The costs are allowed for the favor granted, and a retaxation of them against the defaulting party on the final judgment will not be permitted. So held where a plaintiff failed to appear when the case was called and the case was dismissed with costs. A motion was made by the plaintiff to open the default which was granted upon payment of

$65 costs which were paid. When the cause appeared again on the calendar the plaintiff again defaulted and the complaint was dismissed. Upon the second taxation of costs the court held that if the items of costs after notice of trial and a trial fee for the first trial formed part of the $65 heretofore taxed and paid, such items cannot be retaxed. Andrew *v.* Cross, 17 Abb. N. C. 92.

Similarly where complaint was dismissed and default opened on payment of costs which were paid. The defendant finally succeeded in the action and the bill of costs presented was taxed allowing two trial fees, twenty-five dollars for all proceedings after granting of, and before new trial and disbursements taxed upon dismissal of complaint and upon final trial. On motion for retaxation it was held that the costs should be "retaxed so as to disallow $30 trial fee, and $25 for new trial, and the disbursements for the service of a summons, sheriff's fees on execution and for filing of a note of issue." Harris *v.* Wiener, L. J. Nov. 20, 1915.

§ 100. Costs accrued before amendment of pleading not taxable on final judgment.

A party finally successful in the action is not permitted to tax costs that accrued prior to the amendment of the pleadings where such amendment was not merely a matter of detail but was such as to set up a new cause of action such as substantial performance instead of complete performance. A party has no right to go back and collect on a cause of action in which he was defeated. Rowe *v.* Gerry, 109 A. D. 156; Fox *v.* Davidson, 40 A. D. 620; McEntyre *v.* Tucker, 40 A. D. 444; Lindbald *v.* Lynde, 81 A. D. 603–605.

CHAPTER XIII

APPEALS

§ 101. Statutory provisions, § 3251, subds. 4 and 5.

Costs on appeal to the Appellate Term or Appellate Division are:—

$20 before argument,

$40 for argument,

$20 for making and serving a case, and when the case necessarily contains more than fifty folios, $10 in addition thereto,

$20 for making and serving amendments to a case,

$10 in the Appellate Division, for each term not exceeding five, excluding the term at which it is argued.

In the Court of Appeals:—

$30 before argument,

$60 for argument,

$10 for each term not exceeding ten, excluding the term at which it is argued.

§ 102. Case on appeal must be perfected.

Where the case is improperly on the calendar because the findings are not properly made and signed by the trial judge twenty dollars costs before argument will not be allowed. To entitle a party to these costs under section 3251 of the Code, the case must be in a condition to be argued before the Appellate Court. Nobis *v.* Pollock, 13 N. Y. S. 837.

§ 103. More than one appeal in same case.

Where there is more than one appeal in the same case, costs will be allowed in each case but disbursements in one only. Brassington *v.* Rohrs, 3 Misc. 262; Stanton *v.* King, 76 N. Y. 585.

§ 104. Simultaneous appeal from judgment and order.

Costs cannot be taxed both from the appeal from the judgment, and also from the order denying a motion for a new trial. Van Allen *v.* American National Bank, 10 Abb. Pr. N. S. 331; Bullard *v.* Pearsall, 46 How. Pr. 530. Where, therefore, a verdict having been directed for defendant, and a motion for a new trial having been denied, and an appeal from the judgment and order having been taken and both judgment and order having been affirmed, the court awarded to defendants separate bills of costs on both appeals, it was held that the court having awarded costs on appeal from the judgment, it had no power to allow costs on appeal from the order. (Section 3239, subdivision 2.) Syms *v.* Mayor, 105 N. Y. 153.

But an appeal from a judgment and an order denying a motion for a new trial on newly discovered evidence

is not within section 3239, subdivision 2, and costs of each appeal can be taxed. Streep *v.* McLoughlin, 36 Misc. 165; Pease *v.* Penn. R. R. Co., 137 A. D. 459, aff'd 203 N. Y. 573.

§ 105. When costs of trial need not be retaxed.

The Court of Appeals having reversed a judgment as to one cause of action and granted a new trial and having otherwise affirmed the judgment without costs to either party, the costs of the first trial need not be retaxed after the new trial is had, only costs subsequent to the reversal are taxable. Talcott *v.* The Wabash R. R. Co., 99 A. D. 239.

§ 106. Costs in all courts on entry of final judgment.

The general rule is that a party finally successful in the action is entitled to tax costs of all trials had in the action, as well as costs on appeal unless otherwise ordered by the appellate court. So that where the appellate court reverses a judgment of the City Court with costs to appellant to abide the event, and where in such a case respondent succeeds in the second action he is entitled to tax costs in both trials. Berrent *v.* Simpson, 61 Misc. 611; Capozzi *v.* Bulkley, 156 A. D. 55. So also where a judgment in favor of the plaintiff was reversed with costs to abide the event, and upon a second trial the plaintiff again succeeded, he was entitled to tax costs of both trials. Mossein *v.* Empire State Surety Co., 117 A. D. 782. The event is a determination in the plaintiff's favor on the new trial sufficient to give costs on the trial. Miller *v.* City of Buffalo, 129 A. D. 833. Same rule applies to appeal costs. So held where

an appeal was taken from an order of the Appellate Term reversing a judgment of the Municipal Court ordering a new trial, and the Appellate Division, having reversed the determination of the Appellate Term, affirmed the judgment of the lower court, with costs. The court in that case allowed the successful party costs of the appeal in both courts. Greenwald et al. *v.* Weir, 131 A. D. 568.

§ 107. Amount of recovery less than fifty dollars.

In an action in the City Court where the plaintiff recovers judgment for more than fifty dollars, which is reversed on appeal to the Appellate Term with costs to appellant to abide the event, and on the second trial the plaintiff recovers less than fifty dollars, the plaintiff is not entitled to costs of the first trial nor of the appeal, but defendant is entitled to costs of both trials and costs of appeal. Lennon *v.* Charig, 54 Misc. 298.

§ 108. Dismissal of appeal.

Where an appeal is dismissed for failure to make and serve a case, only ten dollars motion costs can be taxed. Mahon *v.* Mahon, 64 A. D. 262. If, however, an appeal is dismissed upon argument on its merits, general costs may be taxed. Webb *v.* Nortin, 10 How. Pr. 117.

§ 109. Motion costs of appeal need not be taxed.

Where the appellate court grants motion costs there is no necessity to tax them as the order is sufficient in itself. But if disbursements are granted the clerk should tax them. Margulies *v.* Damrosch, 51 N. Y. S. 833.

§ 110. Costs in judgment of affirmance.

A judgment of affirmance should not contain costs

included in a previous judgment, but should contain only costs of appeal. Beardsley Scythe Co. *v.* Foster, 36 N. Y. 561.

§ 111. Costs of appeal to be set off on entry of final judgment.

Where a party to whom costs were allowed on the affirmance of an order, fails on the trial, these costs are to be deducted from the costs of the successful party. Stevenson *v.* Pusch, 40 How. Pr. 91.

§ 112. An appearance in the appellate court subjects a party to costs therein.

Although a party does not appear in the court below to answer or defend a suit against him, nevertheless he may be charged with appeal costs if he is unsuccessful in the relief he asks for in the judgment obtained against him. McWhirter *v.* Bowen, 114 A. D. 68.

§ 113. Objection to appeal costs.

An objection to the costs taxed pursuant to an order of the appellate court can only be made to the appellate court, as the clerk of the lower court has no authority to refuse to tax the costs as directed by such order. Hill *v.* Muller et al., 53 Misc. 262.

§ 114. Costs on appeal from an interlocutory judgment of the City Court.

To ascertain what costs are to be taxed on an appeal from an interlocutory judgment obtained in the City Court of the City of New York it is necessary to determine as to whether the appeal is taken under section 3188 or section 3189 of the Code.

Section 3188 reads:—

> An appeal to the supreme court may be taken from a final or interlocutory judgment rendered in the city court of the city of New York in a case where an appeal may be taken to the appellate division of the supreme court from a final or interlocutory judgment rendered in the supreme court in sections 1346 and 1349 of this act.

Section 3189 reads:—

> An appeal to the supreme court may also be taken from an interlocutory judgment rendered or an order made at chambers or at a special term, or a trial term of said city court * * * in a case where an appeal may be taken to the appellate division * * * from an interlocutory judgment rendered as prescribed in sections 1347, 1348, and 1349 of this act.

Section 3188 was amended by the Laws of 1902, by inserting the words "interlocutory judgment," but there was a failure to omit or to strike out these words in section 3189 and the failure to make such omission the court considered an inadvertence. So that an appeal from an interlocutory judgment was held not to come within section 3189 but section 3188 of the Code and therefore the costs to be allowed on an appeal from a demurrer should be twenty dollars before argument and forty dollars for argument, as provided for in section 3251, subdivision 4, of the Code. Campbell *v.* Hallihan, 46 Misc. 409.

The word "trial" in subdivision 4, is used in a broad sense and is meant to include judgments both interlocutory and final, whether rendered on the law

or equity side of the court. Campbell *v.* Hallahan (*supra*).

§ 115. Interlocutory judgment reversed.

An interlocutory judgment overruling a demurrer to a complaint having been reversed with costs of the appeal and in the trial court, the successful party is entitled to tax twenty dollars before argument, and forty dollars for argument. Campbell *v.* Hallihan (*supra*).

§ 116. Interlocutory judgment affirmed.

But on an affirmance of an interlocutory judgment on a demurrer, the successful party is entitled to the taxation of forty dollars only for argument of appeal. Hill *v.* Muller, 53 Misc. 262.

§ 117. Demurrer heard as a contested motion.

Costs on an appeal from a demurrer brought on as a contested motion at Special Term, is $10 costs at Special Term and $10 costs on appeal. Keyes *v.* Lestershire H. R. Co., 158 N. Y. S. 617. Where, however, the Court of Appeals affirmed a judgment of the Appellate Division overruling a demurrer to an answer heard at special term as a contested motion pursuant to section 976 of the Code, the successful party was held to be entitled to tax $30 before argument and $60 for argument (section 3251, subdivision 5). H. G. Vogel Co. *v.* Wolff, 160 A. D. 831.

§ 118. Only one bill against several respondents.

Where the order of an appellate court affirms an order of the court below "with costs," although there may be

several respondents appearing separately such order has been construed to allow only one bill of costs on appeal. Matter of Kin, 139 A. D. 766.

§ 119. Motion for new trial made at the close of trial.

An appeal from an order entered on either the granting or denial of a motion for a new trial carries costs as provided for in section 3251, subdivision 4, of the Code, $20 before argument and $40 for argument. Where, therefore, upon the rendition of a verdict a motion was made at the trial on the minutes of the court to set the verdict aside which was granted, and, upon appeal the order having been reversed with costs, the clerk refused to allow $20 before argument and $40 for argument, the appellate court reversed the Special Term order which upheld the clerk's ruling and directed that such costs should be taxed. Cusick *v.* Adams, 47 Hun, 455.

Section 3251, subdivision 4, referred to, reads in part as follows, "an appeal * * * from an order granting or refusing a new trial, rendered or made at a trial term of the supreme court or of the city court of the city of New York" before argument $20, and for argument $40.

§ 120. Appeal from order granting new trial on newly discovered evidence. Order reversed.

Costs of appeal on the reversal of an order of the City Court granting plaintiff a new trial on the ground of newly discovered evidence is $20 before argument, and $40 for argument; because the successful party is entitled to the same costs as he would have been entitled to tax in the lower court had he been successful there.

Section 3251, subdivision 3, paragraph 8, provides that a motion for a new trial upon newly discovered evidence must be made on a case and the taxable costs are the same as on an appeal as provided for in subdivision 4 of the same section. Although the costs were denominated in the bill submitted as being costs "upon appeal to the Appellate Term" it was held to be immaterial. Brennan *v.* Joline, 70 Misc. 537.

§ 121. Appeal from order.

An appeal from an order granting or denying a new trial on newly discovered evidence carries only $10 costs, and disbursements are allowable. An allowance of $20 and $40 was held to be improper and was stricken out. Benjamin *v.* Brownstein, 79 Misc. 84.

This latter decision is apparently contrary to that of Brennan *v.* Joline (*supra*). But upon a close reading of the two cases it will be noted that there was in the case of Benjamin *v.* Brownstein (*supra*) an affirmance of the order of the court below, not in any way interfering with costs granted there, and that the only question before the appellate court was as to costs granted on the appeal from the order only. Such costs are governed by section 3236 and section 3251, subdivision 3, par. 9, of the Code allowing only ten dollars.

§ 122. Costs on appeal from order same as motion costs.

The hearing of an appeal from an order is to be regarded as a motion for the purpose of costs, and the same costs are to be allowed as on a decision of a motion. Cassidy *v.* McFarland, 139 N. Y. 201; Matter of Van Dusen, 132 A. D. 592.

§ 123. Costs includes disbursements.

Where an appellate court affirms a *final* order with costs it means ten dollars costs together with disbursements. Cassidy *v.* McFarland, 2 Misc. 189; Matter of Babcock, 86 A. D. 564. Otherwise if it is an interlocutory order. Disbursements in such event must be expressly allowed. Burnel *v.* Coles, 26 Misc. 378.

§ 124. Costs on reargument of appeal.

Where a reargument is ordered the successful party is entitled to the costs of such reargument, provided it was not brought about through any act or omission of the party taxing them. Guckenheimer *v.* Angevine, 16 Hun, 453.

§ 125. Submission of papers same as argument.

A submission of an appeal by consent without oral argument is an "argument" within section 3251 of the Code of Civil Procedure. Malcolm *v.* Hamill, 65 How. Pr. 506.

§ 126. Reargument on disqualification of judge.

Where an appeal was argued before the Appellate Division, and the court ordered a reargument because one of the justices who heard the argument had been transferred, the successful party was entitled to tax a fee for the reargument as well as for the argument of the appeal. Roberson *v.* Rochester Folding Box Co., 68 A. D. 528.

§ 127. Motion costs granted in appellate court.

"Motion costs" imposed on a motion for reargument on appeal form no part of the costs referred to in the

order affirming the judgment below, and the taxation of the same in the lower court was unauthorized. Hill *v.* Muller, 53 Misc. 262.

§ 128. Costs of reargument when same is referred.

Where a reargument was granted but the judges sitting refused to hear or permit reargument and sent the briefs submitted to the judges who had previously heard the argument, the successful party is entitled to tax costs of reargument. Schwartz *v.* Ribaudo, 63 Misc. 64.

§ 129. Costs as awarded in the Court of Appeals.

When the Court of Appeals awards a party costs in the trial court, the award carries with it not only the taxable costs and the taxable disbursements, but such further sum, if any, by way of extra allowance, as that court, in the exercise of a sound discretion may award. Hascall *v.* King, 165 N. Y. 288.

§ 130. "Costs" as used in undertakings on appeal.

The term "costs" as used in section 1326 of the Code, relative to undertakings on an appeal to the Court of Appeals, includes only such costs as are awarded in that court. Gallinger *v.* Engelhardt, 26 Misc. 49.

§ 131. Costs for making and serving a case in Court of Appeals not taxable.

Under section 3251, subdivision 5, of the Code costs allowable to be taxed upon appeal to the Court of Appeals are $30 before and $60 for argument. Nothing can be taxed for making and serving a case. Shaver *v.* Eldred, 86 Hun, 51.

§ 132. Costs for case on appeal to be taxed by appellant only.

The statutory costs allowed for making and serving a case can be taxed only by the appellant. Respondent does not become entitled to them when the appellant is defeated. Feiber *v.* Home Silk Mills, L. J. Nov. 10, 1914.

§ 133. Costs on dismissal of appeal.

Where the Court of Appeals dismisses an appeal "with costs and $10 costs of motion" upon a preliminary motion to dismiss the appeal and after the argument thereof, or upon a motion embodied in the argument of respondent, respondent is not entitled to tax the argument fee in the Court of Appeals. Matter of Wray Drug Co., 93 A. D. 456.

§ 134. Costs in certiorari proceedings.

In certiorari against assessors to review their official actions, the award and taxation of costs is governed by the provisions of Chapter 269 of the Laws of 1880, and costs of appeal, if allowed, are to be allowed as on appeals from orders under section 3239 of the Code of Civil Procedure. People *ex rel. v.* Barker, 90 Hun, 253; People ex rel. *v.* Pratt, 50 State Rep. 355.

§ 135. Costs to abide the event.

The courts have been at variance as to the proper meaning, interpretation, and construction to be placed upon the phrases "with costs" and "with costs to abide the event" as used by the appellate courts in affirming or reversing a judgment or order of the court below. There are two lines of decisions which apparently are

directly opposed to each other. One set of authorities, supported by the highest court in the state, draws a distinction between "with costs" used without any additional qualifying limitation, and "with costs to abide the event," holding that where a judgment is affirmed or reversed "with costs to abide the event," the party finally successful in the action, is entitled to all costs of the action including the costs on appeal; but when an order is affirmed or reversed "with costs" the costs intended are those of the appellate court only.

§ 136. Construed to include all costs in the action.

In an action where the appellate court dismissed with costs all the proceedings below, it was held that the court intended to control the whole subject and award costs in the lower courts. In the Matter of Andrew Hood, 30 Hun, 472. Chief Justice Daly in Star Cash C. Co. *v.* Reinhardt, 6 Misc. 365, said, "when we reverse a judgment of the City Court and order a new trial with costs to the appellant to abide the event, we intend that the costs of appeal to this court, and of the appeal to the General Term of the City Court and of the trial which resulted in the judgment reversed, shall be included in such costs." Similarly held where an order of the Court of Appeals ordered a new trial with costs to abide the event that the costs of the former trial as well as those of the appeal were intended to be allowed. Mott *v.* Consumers Ice Co., 8 Daly, 244.

Another leading case is Franey *v.* Smith, 126 N. Y. 658, where the plaintiff having recovered judgment on the first trial and upon appeal to the Appellate Term the judgment was affirmed, but on appeal to the Court

of Appeals it was reversed and a new trial granted "with costs to abide the event." Upon the second trial the complaint was dismissed. The court, Per Curiam, held that "where we reverse the judgment of the court below, and grant a new trial 'with costs to abide the event' all the costs of the action up to that time are intended."

Opposed to these decisions and more generally followed by a majority of the courts, including the Court of Appeals, are those expressed in a very early decision where the court held that the costs allowed were the costs of appeal only, without drawing any distinction between the phrases "with costs" and "with costs to abide the event" whether the appeal was from a judgment or from an order.

§ 137. Construed as costs in appellate court only.

In Howell *v.* VanSiclen, 8 Hun, 524, the court granted a new trial with costs to defendant to abide the event. The costs allowed were held to mean the costs of the appeal and not the costs of the action. When therefore on the second trial the plaintiff was again successful he became entitled to costs in the action except the costs of the appeal.

So also where a judgment of the City Court was reversed by the Appellate Term with costs to abide the event, the costs conditional on the event were held to be those of the appellate court only. In such a case if the respondent succeeds on the second trial he is entitled to tax costs of both trials. Berrent *v.* Simpson, 61 Misc. 611.

The Appellate Division reversed the Appellate Term and ordered a new trial with costs to appellant to abide

the event. Upon a retrial the respondent again succeeded in obtaining judgment. The court in that case did not allow the taxation of costs and disbursements of the appeal to the Appellate Term, but allowed the taxation of costs of the first trial to stand on the ground that the costs of the trial are given to the successful party by statute and that neither a trial court nor an appellate court can deprive him of it. Walnut Hill Bank *v.* National Reserve Bank, 76 Misc. 208; Murtha *v.* Curley, 92 N. Y. 359.

In Belt *v.* American Central Insurance Co., 33 A. D. 239, the court held that the costs awarded by the Court of Appeals in reversing a judgment with costs to abide the event were costs in the Court of Appeals only. Similarly in First National Bank of Meadville *v.* Fourth National Bank of New York, 84 N. Y. 469, the court said "where an order is made by this court, on appeal from a judgment, with costs to abide the event and without other limitation, the respondent if successful, is entitled to tax the costs of the appeal."

The reversal of the original order was with costs and as construed it entitled the appellant to costs of this court only. Matter of Water Commissioners, 104 N. Y. 677; this case was followed and cited with approval in Broadway Savings Institution *v.* Town of Pelham, 148 N. Y. 737; Dobeck *v.* Austro-American S. S. Co., 83 Misc. 641.

Same rule followed in Adams *v.* Massey, 51 Misc. 230, where the defendant having appealed to the Appellate Division from a judgment against him, the judgment was reversed with costs to appellant to abide the event. The second trial which resulted in a judgment for de-

fendant was also reversed with costs to abide the event. On the third trial the plaintiff having finally succeeded in the action was not allowed to tax the costs of appeal of the first judgment.

"The rule seems to be well established that when the Court of Appeals in its discretion allows or disallows costs its determination of the subject applies to that court only." Fulton *v.* Krull, 151 A. D. 143; Stevens *v.* Central National Bank, 168 N. Y. 560.

The Court of Appeals will not, however, interfere with the construction and interpretation by the lower court of its own order with reference to the words "with costs to abide the event" as used by it. Union Trust Co. *v.* Whiton, 78 N. Y. 491.

§ 138. Party finally successful entitled to tax them.

A recovery of costs in an action may be limited to one of the parties to the action but where an order reversing a judgment and granting a new trial is made with costs to abide the event, without other limitation, the party finally succeeding in the action is entitled to tax them. First National Bank of Meadville *v.* Fourth National Bank of New York, 84 N. Y. 469, distinguished in Thomas *v.* Evans, 50 Hun, 441, wherein the court held that the costs intended were those of the Court of Appeals only.

In Elliot *v.* Luengene, 19 Misc. 428, following the ruling in Starr Cash Car Co. *v.* Reinhardt, a new trial was ordered "with costs to appellant to abide the event," and the respondent plaintiff having again succeeded in the action, he was not entitled to tax the costs of the first trial nor the costs of the appeal.

§ 138a. When appeal costs may be taxed.

On an appeal taken from the Supreme Court to the Court of Appeals the clerk will not tax costs of such appeal unless an order had been previously entered making the order and judgment of the Court of Appeals the order and judgment of the Supreme Court.

Likewise when an order or judgment of the City Court has been appealed to the Appellate Term or Appellate Division, no costs may be taxed until after an order had been entered making the order and judgment of the Appellate Term or Appellate Division the order and judgment of the City Court.

It has been the practice in the City Court not to tax appeal costs unless notice of such taxation has previously been served on the adverse party.

CHAPTER XIV

ACTIONS RELATING TO REAL PROPERTY

§ 139. Right to costs not limited to amount of recovery.

Where the demand for costs is made under subdivision 1, of section 3228 of the Code in an action "triable by a jury to recover real property or an interest in real property, or in which a claim of title to real property arises upon the pleadings" the plaintiff is entitled to tax costs even if he recovers less than fifty dollars if he succeeds as to any part of the title. Hall *v.* Hodskins, 30 How. Pr. 15; Locklin *v.* Casler, 50 How. Pr. 43.

The defendant, however, although he obtains judgment in his favor must obtain a certificate that title to real property was at issue under section 3235 of the Code. If the pleadings do not disclose that title to real property was raised at the trial, the successful party must obtain a certificate from the judge or referee who tried the case certifying to that fact. Cooley *v.* Cummings, 4 N. Y. S. 530.

§ 140. Title to property must be in question.

Unnecessary allegations as to title to real property does not bring up the question of title. Rathbone *v.* McConnel, 21 N. Y. 466; Bloomingdale *v.* Steubing,

35 N. Y. S. 1074. Nor is it sufficient that the question relates to real property. The title must be in question. Collins *v.* Adams, 4 N. Y. S. 217.

If the court had no jurisdiction to try the question of title no costs can be imposed or taxed. Wilkins *v.* Williams, 3 N. Y. S. 897.

Where a personal cause of action is united with one relating to real property and the plaintiff recovers less than fifty dollars in the former and is defeated in the latter he cannot tax costs. Alexander *v.* Hard, 42 How. Pr. 131.

§ 141. Plaintiff must obtain an affirmative judgment.

Where the demand for costs is made under this subdivision there must be a final judgment in plaintiff's favor. Where, therefore, the jury does not find any trespass has been committed and there is no verdict for plaintiff for damages, costs cannot be taxed by the plaintiff. Hill *v.* McMahon, 81 A. D. 324. Costs were allowed where the plaintiff succeeded in establishing trespass in Bowen *v.* Holdredge, 134 A. D. 855.

Where the plaintiff recovers possession of property and six cents damages, the defendant, although he succeeded in recovering six cents damages on the counterclaim for an unlawful interference with an easement, is not entitled to tax costs, because plaintiff succeeded in the action. Peck *v.* Haverstraw Water Supply Co., 81 Misc. 428.

CHAPTER XV

ACTIONS FOR ASSAULT, SLANDER, ETC.

§ 142. Statutory provisions.

Subdivision 3 of section 3228 of the Code provides that "in an action to recover damages for an assault, battery, false imprisonment, libel, slander, criminal conversation, seduction or malicious prosecution; or a fine or penalty in which the people of the state are a party, the plaintiff recovers less than fifty dollars damages, the amount of his costs cannot exceed the damages."

CHAPTER XVI

ACTIONS IN REPLEVIN

§ 143. Statutory provisions.

If the value of a chattel or of all the chattels recovered by the plaintiff, as fixed, together with the damages, if any, awarded to him, is less than fifty dollars the amount of his costs cannot exceed the amount of the value and the damages. Section 3228 of the Code of Civ. Procedure, subdivision 2.

§ 144. Costs dependent on amount of recovery.

The plaintiff in a replevin action in order to entitle himself to a full bill of costs, must establish in addition to his right to recover possession of the chattel in controversy, the fact that its value together with the damages, if any, which shall be awarded to him amounts to the sum of fifty dollars or more. If the amount recovered is less than fifty dollars the costs cannot exceed the amount of such value and damages. Rapid Safety Filter Co. *v.* Wyckoff, 20 Misc. 429.

§ 145. Allowance of costs.

Where, therefore, a plaintiff sued in the City Court of

the City of New York in replevin for property alleged in the complaint and writ to be of the value of $850, and shown to be worth more than $250, and was awarded the property together with $150 damages for the detention, he was entitled to tax the usual costs in an action in the City Court. Smith *v.* Walker, 131 N. Y. S. 676.

So also where the plaintiff in an action for the recovery of a chattel accepts an offer for the return, making no provisions for an amount to be paid in lieu of failure to return the chattels, with two dollars damages for its detention, only two dollars costs which follow the money damages can be imposed. Hausauer *v.* Machawicz et al., 54 A. D. 23.

§ 146. Costs disallowed.

Where all claims for damages for the detention of the property in an action in replevin was waived, and there was also no proof offered which tended in any way "to fix" the value of such property, no costs were allowed to be taxed. Herman et al. *v.* Gervin, 8 A. D. 418. Similarly held in an action in replevin where the plaintiff succeeded in recovering the chattels without fixing any value of the chattels nor obtaining any damages for the detention thereof, costs were not allowed the plaintiff. Lockwood *v.* Waldorf, 36 N. Y. S. 199. The value of the chattels will not be allowed to be shown by affidavit. Rapid Safety Filter Co. *v.* Wyckoff, 20 Misc. 429.

Where the costs allowed cannot exceed the amount recovered, such costs include costs and disbursements. People of the State of New York *v.* Keller, 35 Misc. 785.

§ 147. When recovery is within § 3228, subd. 5, of the Code.

Where in an action in replevin brought in the City Court, the chattels were returned to the plaintiff without having their value fixed on the trial of the action, and the damages allowed were only fifty dollars, the court ruled that the amount recovered being less than two hundred and fifty dollars, section 3228, subdivision 5, applied and no costs were allowable. Hoornbeck *v.* Baker, L. J. Feb. 7, 1914.

CHAPTER XVII

ACTIONS TO RECOVER SUM OF MONEY ONLY

§ 148. Recovery of fifty dollars or more.

To entitle the plaintiff to costs under subdivision 4, section 3228, of the Code, the judgment demanded must be for money only and the recovery must be fifty dollars or more. It does not matter whether the action is legal or equitable. Murthey *v.* Curley, 92 N. Y. 359.

Where a summons contains a notice that upon default judgment will be taken for a specific amount with costs, it will be assumed that the complaint would have demanded a money judgment only, and in such a case it is immaterial whether the action is a legal or an equitable one. Murthey *v.* Burke, 121 A. D. 400.

§ 149. Recovery less than fifty dollars.

A plaintiff having sued three defendants for injuries received, settled with two of them for two thousand dollars. He continued the action against the third and obtained a verdict for six cents. The court disallowed wholly the plaintiff's bill of costs on the ground that the recovery was for less than fifty dollars and came within the provisions of section 3228, subdivision 4, of the Code. Gaetjens *v.* City of New York, 145 A. D. 640.

An action was brought in the City Court and plaintiff

recovered judgment for more than fifty dollars. On appeal judgment was reversed with costs to appellant to abide the event. On the second trial the plaintiff having recovered less than fifty dollars he was not allowed to tax costs of the first trial nor of the appeal. On the contrary the court allowed defendant the costs of the appeal and of both trials. Lennon *v.* Charig, 54 Misc. 299.

CHAPTER XVIII

ALLOWANCE OF COSTS WHEN RECOVERY COMES WITHIN § 3228, SUBDIVISION 5, OF THE CODE

§ 150. Statutory provisions.

The plaintiff is not entitled to costs if he recovers less than one thousand dollars in an action in the Supreme Court where the nature of the action is such that it could have been tried in the City Court but for the amount demanded in the complaint, or where the amount recovered is less than five hundred dollars where the nature of the action is such that it could have been brought in the County Court; or where the plaintiff recovers less than two hundred and fifty dollars in an action in the City Court where the nature of the action is such that it could have been tried in the Municipal Court. Streat *v.* Wolf, 132 A. D. 873.

§ 151. Allowance of costs dependent upon place of service.

The question as to whether the provisions of subdivi-

sion 5 of section 3228 apply is, "where was the service actually made" and not whether any other service could have been made so as to bring the action in a court of lesser jurisdiction. So that although a defendant may have a place of business in New York county but resides in Kings county, nevertheless if he is served in Kings county in an action brought in the New York Supreme Court, the plaintiff is entitled to recover costs although the recovery was less than one thousand dollars. The question is, was the service made in New York county? It is immaterial whether any other service could have been made so as to bring the action within the jurisdiction of the City Court. Moraff *v.* Kohn, 157 A. D. 648.

Where therefore, at the time of the commencement of the action the plaintiff resides in Manhattan and defendant in Brooklyn, Kings county, where he was served with summons, and the trial of the action results in the recovery of less than one thousand dollars the plaintiff is entitled to recover costs. G. P. Putnam's Sons *v.* Picket, 152 A. D. 814.

§ 152. Meaning of "triable."

The word "triable" as used in the section is intended to mean the place of trial as indicated in the venue. Therefore, although defendant was served in Kings county but was tried in Queens county, plaintiff is entitled to costs although the amount recovered was only one hundred dollars. Burgdorf *v.* Brooklyn, Queens County & S. R. Co., 130 A. D. 253.

The term is also intended to refer to conditions not as they existed at the time of bringing of the action but to

conditions existing at time of trial of the action. Seymour *v.* Wheeler, 137 A. D. 52.

§ 153. When amount of recovery brings cause within section.

Plaintiff obtained a judgment for less than two hundred and fifty dollars on failure of defendant to appear in an action brought in the Supreme Court that could have been brought in the City Court. On motion the court opened the default on payment of "costs of action." "Under subdivision 5 of section 3228 of the Code there could be no costs of the action because the amount recovered was less than one thousand dollars, the nature of the action being such that it could have been brought in the City Court. The clerk was justified in refusing to tax a bill of costs and the order directing him to do so was erroneous." Girbekian *v.* Costikyan, 126 A. D. 813.

Where a recovery of less than $250 was had in an action in the Kings County Court that could have been brought in the Municipal Court, the clerk was not authorized to tax costs although the defendant did not assert the prohibition of the statute before the clerk. The plaintiff was deprived of the right to any costs by reason of the express provision of subdivision 5 of section 3228, and it was not necessary to object to the clerk's taxation. Leyden *v.* Brooklyn Heights R. R. Co., 122 A. D. 383.

In an action in the City Court brought upon two causes of action amounting to $776 where one cause of action was settled and by stipulation eliminated from the suit, and the plaintiff recovered a verdict of $200 on the other cause of action, he was not entitled to costs,

and a motion to vacate the taxation should be granted. Hill *v.* Kann, 50 Misc. 360.

§ 154. No allowance on voluntary appearance of defendant.

The Appellate Division has construed differently the effect of a voluntary appearance of a defendant with reference to subdivision 5 of section 3228 of the Code, making such voluntary appearance in one instance equivalent to a personal service and in other instances refusing to consider it equivalent to personal service within the meaning of that subdivision.

Upon a critical reading of the cases, however, it will be observed that the defendant in one instance is a resident of the county where the trial of the action takes place and in the other he is a non-resident. So that when there was a voluntary appearance by a resident of the county of New York in an action in the Supreme Court it was considered equivalent to personal service upon him and the plaintiff having recovered less than one thousand dollars he was not entitled to tax any costs. Hubbard *v.* Heinze, 145 A. D. 828.

§ 155. When costs allowed on voluntary appearance of defendant.

But in an action brought in the Supreme Court against a foreign non-resident defendant upon whom service of summons by publication has been improperly effected and who voluntarily appears in the action, the plaintiff, although he recovered less than one thousand dollars, was allowed to tax a full bill of costs. The court construed such voluntary appearance not the equivalent

of a personal service within the county so as to preclude the plaintiff from taxing costs. "The sole test prescribed by the provisions of subdivision 5, with respect to whether the action could have been brought in the City Court is whether service was actually made in New York county." Jacob *v.* White, 164 A. D. 111.

Similarly held in an action in the City Court where defendant was a non-resident and before service by publication was commenced he voluntarily appeared in the action and the court directed the taxation of the costs although the recovery was only one hundred dollars, such voluntary appearance not having been considered as personal service within the provisions of the section. Swartout *v.* Scheideberg, 68 Misc. 133.

§ 156. Subdivision 5 does not apply to appeal costs.

Subdivision 5 of section 3228 has no application whatever to costs given on appeal. La Rosa *v.* Wilner, 54 Misc. 574.

Where, therefore, upon appeal a new trial is granted with costs to abide the event, such costs are taxable notwithstanding section 3228, subdivision 5, limiting taxation of costs in certain cases. Section 3237 of the Code provides that such section shall not affect the recovery of costs on appeal. Seldin *v.* Block, 153 N. Y. S. 980.

§ 157. Effect of subdivisions 4 and 5 of § 3228 and § 3229.

The defendant is entitled to costs if the plaintiff recovers less than fifty dollars as provided for in section 3228, subdivision 4, in conjunction with section 3229 of the Code. But neither plaintiff nor defendant is en-

titled to costs if the plaintiff recovers $50 or more, but less than $1,000 in an action in the Supreme Court where the nature of the action is such that it could have been tried in the City Court but for the amount demanded; or where the plaintiff recovers $50 or more and less than $250 in an action in the City Court where the nature of the action is such that it could have been tried in the Municipal Court.

The latter part of subdivision 5 stating that "the fact that in any action a plaintiff is not entitled to costs under the provisions of this subdivision shall not entitle the defendant to costs under the next following section" is applicable to cases in which the plaintiff cannot tax costs solely by reason of that subdivision. Streat *v.* Wolf, 132 A. D. 873. The latter part of subdivision 5 is not intended to deprive defendant of costs merely because the plaintiff is not entitled to costs by reason of his failure to recover the amount specified therein. So that where a plaintiff refused to accept an offer of judgment by defendant and on trial he recovers less than the amount offered, defendant is entitled to costs subsequent to the time of the offer. Patterson *v.* Woodbury Dermatological Institution, 117 A. D. 600.

A reference under the Code is governed in the matter of costs in the same way as all other actions, and it is necessary for plaintiff to recover the amounts specified in section 3228, subdivisions 4 and 5, to entitle him to costs.

CHAPTER XIX

DEFENDANT ENTITLED TO COSTS

§ 158. Statutory provisions; § 3229.

Defendant is entitled to costs upon the rendering of a final judgment when the plaintiff is not. "But where in such an action against two or more defendants, the plaintiff is entitled to costs against one or more, but not against all of them, none of the defendants are entitled to costs, of course. In that case costs may be awarded, in the discretion of the court, to any defendant, against whom the plaintiff is not entitled to costs, where he did not unite in an answer, and was not united in interest, with a defendant, against whom the plaintiff is entitled to costs."

§ 159. When one of several defendants obtains judgment.

So that, where a complaint has been dismissed as to one defendant who answered separately, costs are in the discretion of the court, and judgment entered in such case including costs where none have been awarded, should be corrected on motion. Ljunquist *v.* Hartmetz, 54 Misc. 87.

In an action against endorsers and maker of a note wherein the maker defaults and the endorsers, as de-

fendants, answer and obtain judgment, they cannot tax costs without an order of the court allowing them to do so. Bruck *v.* Lambeck, 63 Misc. 185.

§ 160. Where attorney for defendant is public official.

The fact that the defendants were represented by the corporation counsel who receives no compensation except an official salary, is of no effect. The defendants having succeeded in the action their right to costs of the action is statutory. Stearns *v.* Titus, 114 A. D. 197.

CHAPTER XX

PARTIAL RECOVERY BY BOTH PARTIES IN SUIT OF SEVERAL CAUSES OF ACTION

§ 161. Statutory provisions; § 3234.

Section 3229 of the Code reads in part, "The defendant is entitled to costs, of course, upon the rendition of final judgment in an action specified in the last section (section 3228) unless the plaintiff is entitled to costs as therein specified."

Section 3234 of the Code provides that "In an action specified in section 3228 of this act wherein the complaint sets forth separately two or more causes of action upon which issues of fact are joined, if the plaintiff recovers upon one or more issues and the defendant upon the others, each party is entitled to costs against the adverse party, unless it is certified that the substantial cause of action was the same on each issue, in which case the plaintiff only is entitled to costs. Costs to which a party is so entitled must be included in the final judgment by adding them to or offsetting them against the sum awarded the prevailing party * * *".

§ 162. Allowance of costs to both plaintiff and defendant.

It is necessary for defendant, in order to be allowed costs within the foregoing provisions of the Code, to obtain an affirmative judgment in his favor as to one or more of the causes of action alleged in the complaint, in the form of a verdict or finding that will have the effect of disposing of the cause of action and be conclusive on the parties. A mere dismissal of complaint, however, or a nonsuit is not sufficient.

Where, therefore, causes of action were separately stated, and issues of fact were taken as to each of them, and the jury was instructed to render a verdict for defendant as to one cause of action and the plaintiff succeeded as to the other cause of action, all the provisions for two bills of costs contained in section 3234 were present, for in regard to each of such cause of action there was a decision by a proper tribunal of a question of fact which was conclusive on the parties to the action, and the defendant was allowed to tax his bill of costs. Browning *v.* Lake Erie & W. R. R. Co., 64 Hun, 513.

Same ruling obtained where an action was brought on two separate notes and the Statute of Limitations having been pleaded as to them, the court decided in the defendant's favor as to one of them and the plaintiff having obtained judgment as to the other, the court allowed defendant as well as the plaintiff to tax his bill of costs. The fact that the court decided in defendant's favor, instead of the jury by direction of the court is not controlling. There was a finding in favor of defendant on that issue. Blashfield *v.* Blashfield, 41 Hun, 249.

Thus also in an action in replevin where the jury found in favor of plaintiff as to part of the property and for

defendant as to the remainder, assessing the value of defendant's part, it was held that the defendant was entitled to costs. Johnson *v.* Fellows, 6 Hill, 353.

§ 163. When defendant not entitled to costs.

Where the plaintiff in his complaint sets forth three causes of action as to two of which he is *nonsuited* and succeeds as to the third, the defendant is not entitled to tax costs. The appellate court in its opinion says that, "In such cases if defendant intends to claim costs, he should ask for an affirmative verdict or finding in his favor that will have the effect of disposing of the cause of action as to which the plaintiff has failed. * * * It is only when he recovers upon one or more of the causes of action that costs follow, and in the absence of an actual verdict, finding, or judgment in his favor this condition is not satisfied." Burns *v.* D., L. & W. R. R. Co., 63 Hun, 19, aff'd 135 N. Y. 268; Crossley *v.* Cobb, 42 Hun, 166; Moosbrugge *v.* Kaufman, 7 A. D. 380; Reilly *v.* Lee, 33 A. D. 201.

In Reilly *v.* Lee (*supra*) two causes of action were set up in a complaint. The referee before whom the case was tried *nonsuited* the plaintiff as to one and rendered a general report in his favor as to the other for a sum of money upon which a judgment was entered, but there was not an affirmative verdict or finding or judgment in favor of defendant. The latter was not allowed to tax costs because he had not "recovered" upon any of the issues.

Nor was the defendant allowed to tax costs upon the dismissal of the complaint as to one of two causes of action in a suit for libel, the plaintiff having recovered

on the other. McCarthy *v.* Innis, 61 Hun, 354; Briggs *v.* Allen, 4 Hill, 538.

§ 164. When counterclaim is interposed by defendant, prevailing party entitled to costs.

The rule, however, applicable to the allowance of costs where defendant interposes a counterclaim is different. Costs in that case follow the allowance of general costs. The prevailing party or the party obtaining an affirmative judgment in the action, is entitled to them.

A defendant prevails in an action when he defeats the plaintiff's claim either by disproving it or by establishing a counterclaim equal to or greater than the demand in the complaint. Rohrs *v.* Rohrs, 72 Misc. 108.

Therefore, although a plaintiff prevails upon the cause of action alleged in the complaint, nevertheless, if an offset equal to or greater than the amount of the claim is established, the defendant and not the plaintiff is the prevailing party in the action and the former is entitled to tax costs. Rohrs *v.* Rohrs, 72 Misc. 108. "Costs follow the judgment. The party in whose favor judgment is to be entered is the prevailing party. * * * It matters not that the defendant has failed to establish his counterclaim that he has set up, he is still entitled to judgment and to costs if the plaintiff does not get judgment." Crain *v.* Holcomb, 2 Hilton, 269.

To the same effect in Thayer *v.* Holland, 63 How. Pr. 180, and Whitlegge *v.* DeWitt, 12 Daly, 319, where it was held that although the defendant did not sufficiently establish the counterclaim, nevertheless, the plaintiff having failed to establish his right to recovery, the defendant was the prevailing party and entitled to costs.

Section 3234 of the Code has no application to a case of this kind.

In an action on contract defendant denied the contract and interposed a counterclaim. On the trial of the action the jury brought in a verdict for defendant on the cause of action and a verdict for plaintiff on the counterclaim. The finding of the jury for plaintiff on the counterclaim had the effect merely of disallowing the counterclaim, and the finding by the jury on the main cause of action for defendant adjudged him the prevailing party in the action and entitled him alone to tax costs. Rohrs *v.* Rohrs, 72 Misc. 108; Ury *v.* Wilde, 3 N. Y. S. 791.

Where, however, a counterclaim is interposed and the jury finds for plaintiff on the cause of action and for defendant on the counterclaim, and after deducting the counterclaim the plaintiff is entitled to $150, held that there being an affirmative judgment for the plaintiff the defendant cannot tax costs. The plaintiff, however, cannot tax costs if the action was brought in the City Court and the recovery was less than two hundred fifty dollars (section 3228, subdivision 5). Auerbach *v.* Ramor, L. J. Feb. 20, 1915.

CHAPTER XXI

DRAWING INTERROGATORIES AND TAKING DEPOSITIONS

§ 165. Statutory provisions as to drawing interrogatories.

Sec. 3251, subdivision 3, par. 3. For drawing interrogatories to be annexed to a commission, or to letters rogatory, issued as prescribed in sections 888, 912, 913, and 3171 of this act, ten dollars.

Under this section of the Code a party is entitled to ten dollars for drawing interrogatories although they may never have been served. Evans *v.* Silberman, 7 A. D. 139.

§ 166. Only one fee of ten dollars taxable.

But one charge of ten dollars can be made for all in-

terrogatories annexed to a commission although a number of witnesses are named therein and separate interrogatories are drawn for each. O'Brien *v.* Commercial Fire Insurance Co., 38 N. Y. Sup. Ct. Rep. 4; Burns *v.* D., L. & W. R. R. Co., 135 N. Y. 268.

§ 167. Where more than one fee may be charged.

Where separate commissions must issue for the examination of witnesses in different localities, the party successful in the action is entitled to tax in his bill of costs the sum of ten dollars each for drawing the interrogatories attached to each commission. Rose *v.* Swarthout, 73 Misc. 583.

§ 168. Statutory provisions as to taking depositions.

Sec. 3251, subdivision 3, par. 2. For taking the deposition of a witness or a party as prescribed in section 870, section 871, or section 893 of this act, ten dollars.

Section 872 and those following set forth under what conditions the court will order a deposition to be taken.

Section 879 allows a deposition to be taken on consent of the parties, upon a stipulation in writing, the same to be either orally or upon interrogatories to be agreed upon in like manner.

§ 169. Fees are statutory and follow issuance of commission.

Where a commission has been issued the statutory allowance follows, and neither the court nor the taxing officer can institute an inquiry as to the necessity there-

for. The party entitled to the general costs in the action is entitled to tax them. Burns *v.* D., L. & W. R. R. Co., 135 N. Y. 268.

§ 170. Deposition by stipulation.

Where the parties to an action, instead of taking the deposition of a party or witness under an order of the court, stipulate in writing under section 879 of the Code, that such deposition be taken, the successful party is entitled to tax costs for the deposition. Smith *v.* Servis, 59 Hun, 552, disapproving Newman *v.* Greif, 3 Civ. Pro. Rep. 362.

§ 171. Fee follows general costs.

The allowance under the statute belongs to the party entitled to the general costs in the action. So that, although the plaintiff did not succeed as to the cause of action for which he obtained the deposition, he was nevertheless allowed to tax ten dollars because he was entitled to the general costs of the action. Burns *v.* D., L. & W. R. R. Co., 135 N. Y. 268.

§ 172. One fee allowable where one order is issued.

Where an order was issued for the examination of several witnesses and three of them were examined, only one fee of ten dollars was allowed. Burns *v.* D., L. & W. R. R. Co., 135 N. Y. 268.

§ 173. Where several parties obtain orders.

Where several plaintiffs obtain orders to examine the same defendant and although the plaintiffs are represented by the same attorney and the defendant is examined only once, nevertheless, if the defendant is successful

in the action, he is entitled to tax ten dollars for each order so obtained. Steiner *v.* Ainsworth, 53 How. Pr. 31.

§ 174. Allowance of costs although examination is waived.

A party is entitled to the statutory allowance for attending an examination of a party before trial pursuant to an order or stipulation where such party attends ready to be examined, although the examination is waived and is never had thereafter. Steiner *v.* Ainsworth, 53 How. Pr. Rep. 31.

§ 175. Costs allowed although order was obtained by adverse party.

The successful party is entitled to tax the costs for the taking of a deposition before trial although the order for the deposition was obtained by the adverse party. So held where the plaintiff obtained the order and the defendant was allowed to tax the costs. Steiner *v.* Ainsworth, 53 How. Pr. Rep. 31.

§ 176. No allowance when officer other than commissioner takes deposition.

Where a deposition was ordered to be taken but the court failed to appoint a commissioner, and a notary public did nothing but administer the oaths, it was held improper to tax his fees as a commissioner. Valk *v.* Erie R. R. Co., 128 A. D. 470.

Where there was no proof before the clerk that commissioner's fees in taking the deposition were paid or any obligation to pay them incurred, they were improperly taxed. Burns *v.* D., L. & W. R. R. Co., 135 N. Y. 268.

CHAPTER XXII

ADDITIONAL ALLOWANCE TO PLAINTIFF ON FORECLOSURE, ETC.

§ 177. Statutory provisions.

Sec. 3252. Where the action is brought to foreclose a mortgage upon real property; or for the partition of real property; or to procure an adjudication upon a will or other instrument in writing; or to compel a determination of a claim to real property; or where in any action, a warrant of attachment against property has been issued; the plaintiff, if a final judgment is rendered in his favor, and he recovers costs, is entitled to recover in addition to the costs prescribed in the last section * * *:

Upon a sum not exceeding two hundred dollars, ten per centum.

Upon an additional sum, not exceeding four hundred dollars, five per centum.

Upon an additional sum, not exceeding one thousand dollars, two per centum * * *.

Sec. 3253. In an action brought to foreclose a mortgage upon real property, or for the partition of real property, or in a difficult and extraordinary

case, * * *, the court may also in its discretion, award to any party a further sum as follows:

1. In an action to foreclose a mortgage, a sum not exceeding two and one-half per centum upon the sum due, or claimed to be due upon the mortgage, nor the aggregate sum of two hundred dollars.

2. In any action, or special proceeding, * * *, a sum not exceeding five per centum upon the sum recovered or claimed, or the value of the subject-matter involved.

Sec. 3254. But all the sums awarded to the plaintiff * * * cannot exceed, in the aggregate, two thousand dollars.

§ 178. How value of property is fixed.

For the purpose of fixing the allowance which may be made to the plaintiff, in accordance with the foregoing provisions of the Code, the value of the subject-matter involved is the value of the whole property, and for the purpose of fixing the allowance to any defendant, the value of that particular defendant's interest is the value of the subject-matter involved. Warren *v.* Warren, 203 N. Y. 250.

In an action for partition the "subject-matter" involved is the property partitioned and it is its value, and not upon the plaintiff's share in it that extra allowance should be computed. Doremus *v.* Crosby, 66 Hun, 125.

In an action to restrain the use of a trade name an extra allowance is to be computed not on the mere amount of the damages recovered but on the value of the trademark. Such allowance shall be within the limits of section 3254 of the Code. Perkins *v.* Heert, 14 Misc. 425.

§ 179. Limitation of allowance to two thousand dollars defined.

The limitation that in no event shall the allowance to a plaintiff, or to a party, or two or more parties on the same side exceed two thousand dollars, means that the allowance to a plaintiff cannot exceed two thousand dollars, and the allowance to all defendants considered as a class or a "side" shall not exceed two thousand dollars. Warren *v.* Warren, 203 N. Y. 250; Senter *v.* Petheram, 64 Misc. 294. Same ruling applies also to an allowance of counsel fees in proceedings for the acquisition of land. Matter of Simmons, 71 Misc. 152; People ex rel. Armstrong *v.* Quigley, 75 Misc. 151.

CHAPTER XXIII

WHEN DEFENDANT ENTITLED TO INCREASED COSTS

§ 180. Statutory provisions.

Sec. 3258. In either of the following cases a defendant, in whose favor a final judgment is rendered, in an action wherein the complaint demands judgment for a sum of money only, or to recover a chattel; or a final order is made, in a special proceeding instituted by a State writ, is entitled to recover the costs, prescribed in section 3251 of this act, and, in addition thereto, one-half thereof:

1. Where the defendant is or was a public officer * * * appointed or elected * * * to perform the duties of such an officer; and the action * * * was brought by reason of an act * * * or an alleged omission by him, to do an act, which it was his official duty to perform.

2. Where the action was brought against the defendant, * * * by command of such officer * * * touching the duties of the office or appointment.

3. Where the action was brought against the de-

fendant, for taking a distress, making a sale, or doing any other act, by or under color of authority of a statute of the State.

But this section does not apply, where an officer * * * unites in his answer with a person not entitled to such additional costs.

Sec. 3259. The increase specified in the last section, does not extend to the disbursements; * * *.

§ 181. Increased costs allowed in an action against sheriff.

Where an action is brought against a sheriff to recover a sum of money or a chattel by reason of some act done by him by virtue of his office and a final judgment is rendered in his favor, he has an absolute right to the additional costs given him by the statute. Smith *v.* Cooper, 30 Hun, 395; also allowed to a policeman, Enright *v.* Shalvey, 1 City Ct. Rep. 58.

So also in an action where the plaintiff claims that the sheriff collected on an execution more than sufficient to satisfy the same and failed to pay over the surplus to him and sought to recover such surplus, the case is within section 3258 of the Code; the sheriff if successful is entitled to double costs. Van Gelden *v.* Hallenbeck, 15 Civ. Pro. Rep. 333.

§ 182. Not allowed in action on bond of officer.

But an action brought by a sheriff against a deputy and the sureties on the bond to recover for a breach of the conditions, is not an action in which defendants, if successful, are entitled to increased costs. Hall *v.* Dusenbury, 38 Hun, 125.

§ 183. Writ of certiorari not within the section.

Subdivision 1 of section 3258 of the Code does not apply to proceedings instituted by writ of certiorari. Such costs are regulated by section 2143 of the Code authorizing the court to allow fifty dollars and disbursements. People ex rel. Hall *v.* Town Auditors, 42 A. D. 250.

§ 184. Allowance of increased costs includes costs on appeal.

The additional allowance given to public officers is not limited to courts of original jurisdiction but extends to costs of appeal. Wood *v.* Excise Comm., 9 Misc. 507; Burkle *v.* Luce, 1 N. Y. 239; Porter *v.* Cobb, 25 Hun, 184.

CHAPTER XXIV

OFFER OF JUDGMENT

§ 185. Statutory provisions.

Sec. 732. A tender * * * does not avail the defendant, unless the money is accepted or is paid into court, and notice thereof in writing served upon the plaintiff's attorney before the trial and within ten days after the tender. If the plaintiff takes out the amount paid in, he accepts the tender.

Sec. 733. If it appears, upon the trial that the sum so tendered was sufficient to pay the plaintiff's demand, or to make amends for the injury, and also to pay the costs of the action, to the time of the tender, the plaintiff cannot recover costs or interest, from the time of the tender, but must pay the defendant's costs from that time.

Sec. 737. If the plaintiff does not accept the

offer, he cannot prove it upon the trial. But if the damages, awarded to him, do not exceed the sum offered, the defendant is entitled to recover the expenses, necessarily incurred by him in preparing for trial of the question of damages. The expenses must be ascertained, and the amount thereof determined by the judge, or the referee, by or before whom the cause was tried.

Sec. 738. The defendant may before the trial, serve upon the plaintiff's attorney, a written offer, to allow judgment to be taken against him, for a sum, or property, or to the effect, therein specified, with costs. * * *. If the plaintiff, within ten days thereafter, * * * accepts the offer * * * the clerk must enter judgment accordingly * * *. If notice of acceptance is not thus given * * * (and) if the plaintiff fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time.

§ 186. Plaintiff's acceptance of offer.

In accordance with the statutory provisions, therefore, the plaintiff is entitled to costs and disbursements only up to the time of the acceptance of the offer and such disbursements that may be incurred in entering up judgment. Allen *v.* Glass, 60 Hun, 546; Pomeroy *v.* Huhlin, 7 How. Pr. 161. See also Hawley *v.* Davis, 5 Hun, 642. He is also entitled to the costs up to the time of the offer although on the trial of the action he does not obtain a more favorable judgment than the offer. Mangin *v.* Dinsmore, 47 How. Pr. 11; Hirshspring *v.* Boe, 20 Abb. N. C. 402.

The offer must be with costs. Ranney *v.* Russell, 3 Duer, 689; Loring *v.* Morrison, 25 A. D. 139. Offer must be definite. Post *v.* N. Y. Central R. R. Co., 12 How. Pr. 552. And without condition. Pinckney *v.* Childs, 7 Bosw. 660; Hanna *v.* Dexter, 15 Abb. 135.

§ 186a. When offer must be made.

The offer of judgment must be made ten days before the trial, otherwise, defendant cannot take advantage of the provisions of the statute. Pomeroy *v.* Huhlin, 7 How. Pr. 161; Walker *v.* Johnson, 8 How. Pr. 240. Plaintiff cannot, however, accept the offer after he elects to go to trial. Corning *v.* Radley, 25 Misc. 318; Guttroff *v.* Wallach, 3 Misc. 136.

Notice of withdrawal of answer given less than ten days before trial cannot be construed as an offer of judgment. Perine *v.* Wiggins, 18 Civ. Pro. Rep. 172.

§ 186b. Withdrawal of offer.

An offer of judgment made by defendant cannot be withdrawn before the expiration of the ten days within which plaintiff may accept same. Hackett *v.* Edwards, 22 Misc. 659; McVicar *v.* Keating, 19 A. D. 581.

§ 187. Recovery by plaintiff in excess of offer.

The plaintiff is entitled to full costs where he recovers any amount in excess of the offer of judgment. Therefore where the plaintiff brings suit on two causes of action and he recovers judgment on one cause of action the exact amount of the offer of defendant and only six cents damages on the other, he is entitled to costs. Dayton *v.* Parke, 67 Hun, 137.

§ 187a. When counterclaim is interposed.

Plaintiff's recovery was also held to be more favorable than the offer although the amount so recovered was 97 cents less than the offer but it extinguished a counterclaim of $25. Smith *v.* Sheldon, 94 A. D. 497. When the offer fails to include counterclaims of defendant, the plaintiff is entitled to costs although he recovers a less amount. Kantz *v.* Vanderburgh, 28 N. Y. S. 1046. But when defendant makes his offer of judgment before he puts in an answer, and the plaintiff recovers less than the offer, defendant is entitled to costs from the time of offer although counterclaims arising out of the transaction are extinguished, which, together with the recovery, would exceed the offer. Dowd *v.* Smith, 8 Misc. 619.

Where, however, an action is brought to foreclose a mechanic's lien, and defendant offers a sum of money and costs only, acceptance of such a tender by the plaintiff will not permit him to enter judgment of foreclosure, and consequently when the plaintiff recovers judgment establishing the same amount of lien and interest and also in addition a direction to sell the property and entry of judgment for a deficiency, such recovery is a more favorable one and the plaintiff is allowed full costs. McNally *v.* Rowan, 101 A. D. 342, aff'd 181 N. Y. 556.

§ 187b. On foreclosure of mechanic's lien.

In an action to foreclose a mechanic's lien, an offer was made to allow judgment "establishing the amount of plaintiff's lien" at a certain sum and costs, defendant was entitled to costs if the offer was not accepted and plaintiff failed to recover a larger sum. Pfister *v.* Stumm, 7 Misc. 526.

Where plaintiff accepts an offer of judgment for less than fifty dollars the statutory provisions in section 3228 apply. Johnson *v.* Sager, 10 How. Pr. 552.

§ 188. When defendant entitled to costs.

Defendant is entitled to costs subsequent to the offer when the recovery by the plaintiff is not greater than the offer. Smith *v.* Kerr, 1 N. Y. S. 454. Similarly held that where the plaintiff proceeds with an action after a tender and deposit of the amount claimed, he is liable for costs if he recovers less than the amount of the tender. Heller *v.* Katz, 62 Misc. 266; Beil *v.* Supreme Council, 42 A. D. 168.

This is so notwithstanding that the court ordered judgment for plaintiff "with costs." Kiernan *v.* Agricultural Ins. Co., 3 A. D. 26.

Interest accruing after the offer is made cannot be added so as to make the recovery of plaintiff more favorable. Johnston *v.* Catlin, 57 N. Y. 652. Nor can the judgment of plaintiff be regarded "more favorable" although the amount is more than the sum offered, if that sum together with interest to date of judgment exceeds the amount recovered. Tillman *v.* Keane, 1 Abb. N. S. 23; Hirschspring *v.* Boe, 13 Civ. Pro. Rep. 125.

One partner cannot make an offer of judgment in behalf of the other partner. Garrison *v.* Garrison, 67 How. Pr. 271. When it is made, however, it does not bar any remedies against the other joint debtors. Kantrowitz *v.* Kulle, 13 Civ. Pro. Rep. 74. In a suit against a copartnership, one cannot make an offer without the approval of the other. Rich *v.* Roberts, 18 Civ. Pro. Rep. 205; Everson *v.* Gehrman, 10 How. Pr. 301.

An offer of judgment by one of two defendants sued for a firm debt, is not a sufficient offer, although the recovery obtained against both defendants on the trial is less than the offer made because a judgment against both defendants is a more favorable one and the plaintiff was held entitled to full costs. Bannerman *v.* Quackenbush, 17 Abb. N. C. 103; Rich *v.* Roberts, 18 N. Y. Civ. Pro. Rep. 205. But where one defendant is in default and the other defendant makes a tender of judgment, such offer is a good one and plaintiff must recover a larger sum to entitle him to costs subsequent to the offer. LaFarge *v.* Chilson, 3 Sandford, 752.

§ 189. When recovery is reduced so as to be less than offer.

Where an appellate court reduces a judgment of the court below and modifies it so that it is less than the offer made before trial, defendant is entitled to costs subsequent to the offer same as though judgment had been rendered for that amount. Sturgis *v.* Spofford, 58 N. Y. 103.

The provisions of section 738 of the Code have no application to suits of foreclosure of mechanics' liens. Ball *v.* Doherty, 144 A. D. 277; Salerno *v.* Vogt, 78 Misc. 64.

Defendant's costs, when awarded, should be set off on entry of judgment. Warden *v.* Frost, 35 Hun, 141; Coatsworth *v.* Ray, 52 N. Y. S. 498.

§ 190. Confession of judgment.

On confession of judgment plaintiff is entitled to have fifteen dollars costs taxed and taxable disbursements in accordance with section 1275 of the Code.

CHAPTER XXV

REFEREE'S FEES

§ 191. Statutory provisions.

Fees allowed to referees are governed by section 3296 of the Code which reads as follows:—

> A referee, in an action or a special proceeding brought in a court of record, or in a special proceeding, taken as prescribed in title twelve of chapter 17 of this act, is entitled to ten dollars for each day spent in the business of the reference; unless at or before the commencement of the trial or hearing, a different rate of compensation is fixed, by the consent of the parties, other than those in default for failure to appear or plead, manifested by an entry in the minutes of the referee, or otherwise in writing, or a smaller compensation is fixed by the court or judge in the order appointing him.

§ 192. Without stipulation only legal fees are taxable.

Therefore where no agreement is made as to any other compensation the referee is entitled to the legal fee of ten dollars a day. He must submit a statement setting forth the time occupied by him in the reference before his fee can be taxed. Gilbert *v.* Deshon, 16 N. Y. S. 36.

§ 193. Effect of stipulation as to fees.

While the parties may upon written stipulation agree to give him a larger amount than provided for in the statute (Mark *v.* Buffalo, 87 N. Y. 184) the referee cannot fix his own compensation. Smith *v.* Dunn, 94 A. D. 429.

Where, therefore, parties to a reference stipulate that referee's fees "shall be ten dollars an hour for each sitting" the agreement limits his right to compensation, and he is not entitled to the statutory compensation of ten dollars a day in addition when not sitting. Morganthaler *v.* Carlin, 132 A. D. 361, aff'd in 198 N. Y. 502.

When a stipulation is silent as to any matter no force can be given to any alleged agreement or understanding in the face of the statute that it must be in writing. Mead *v.* Tuckerton, 105 N. Y. 557.

Where a stipulation is entered into fixing the referee's fees and stenographer's fees, and providing that they "shall be taxed as disbursements in the action" and the referee finds that the plaintiff is not entitled to tax costs, plaintiff cannot tax such fees as disbursements because the allowance of disbursements depends on recovery of costs. Megrue *v.* Megrue, 160 A. D. 817. An agreement that the fees shall be shared by both parties will be enforced. Brick *v.* Fowler, 61 How. Pr. 153.

§ 194. Several actions tried together.

Where two actions are tried together only one fee can be charged for each day. Milliman, p. 499. Also when he decides several cases on the same day only one fee is to be charged. Id.

§ 195. Fee for every day of attendance.

Referee is entitled to fees for every day's attendance and readiness to take testimony where an adjournment was had at the request of the parties made at that time. Blank *v.* Spies, 62 N. Y. S. 1039; Brush *v.* Kelsey, 47 A. D. 270. But such charge cannot be made when the adjournment was made before that day. Mead *v.* Tuckerton, 105 N. Y. 557.

§ 196. Fee allowed for preparation of report.

Referee will be allowed a fee for a reasonable time spent in the consideration of the case after its submission, in reaching a conclusion, and in the preparation of his opinion and report. Finkel *v.* Kohn, 53 N. Y. S. 694; Brown *v.* Windmuller, 14 Abb. Pr. N. S. 359.

A referee who has made a report and has been paid his fees is entitled to further compensation at the rate of ten dollars a day for services necessarily performed upon a proposed amendment to a proposed case. Butterly *v.* Deering, 69 Misc. 75.

§ 197. Where no fee will be allowed.

Compensation for the time spent in going to and returning from the place where the hearings are held cannot be allowed as part of time spent in hearing and determining the question. People *v.* Bank of Staten

Island, 70 Misc. 637. Nor will any allowance be made to him for expenses such as car fares, hotel bills, etc. Brown *v.* Sears, 23 Misc. 559.

§ 198. Attorneys of parties may stipulate.

The attorneys are authorized to stipulate as to the referee's fees. Such a stipulation comes within the provisions of the section where the "consent of the parties * * * in writing" is required. Mark *v.* City of Buffalo, 87 N. Y. 184.

Where such an agreement has been entered into the courts will not interfere unless fraud, collusion or deceit can be shown. Wolff *v.* Horn, 9 Misc. 100.

§ 199. Report of referee must be filed as prescribed.

The report of the referee must be filed as prescribed in section 1019 of the Code which reads:—

> Upon the trial, by a referee, of an issue of fact, or an issue of law, or where a reference is made as prescribed in section 1015 of this act, the referee's written report must be either filed with the clerk, or delivered to the attorney for one of the parties within 60 days from the time when the cause or matter is finally submitted; otherwise either party may before it is filed or delivered, serve a notice upon the attorney for the adverse party, that he elects to end the reference. In such a case the action must thenceforth proceed as if the reference had not been directed; and the referee is not entitled to any fees.

The report must actually be delivered or filed to prevent the reference from being terminated. A mere

readiness to deliver upon being paid the fees, is not sufficient. Phipps *v.* Carman, 23 Hun, 150, aff'd 84 N. Y. 650.

A delivery "on the assurance that the same should not be filed until the referee's fees should be paid" is equally insufficient. Douglas *v.* Smith, 19 N. Y. S. 630.

However, a failure to file the report within the time does not make such report void. Some steps must be taken to show the intention to end the reference. Parker *v.* Baxter, 19 Hun, 410.

At the end of 60 days any notice is sufficient if it informs the other side to that effect. Gregory *v.* Cryder, 10 Abb. Pr. N. S. 289.

§ 200. Misconduct of referee.

Where by reason of the misconduct of the referee his report and judgment thereon are set aside, the costs of the reference cannot be taxed. New York Bank Note Co. *v.* Hamilton Bank Note Co., 75 N. Y. S. 520.

Where a reference is terminated in the manner pointed out in section 1019 of the Code "the referee is not entitled to any fees. The referee, therefore, having failed to file his report brought himself within that section and the payment of his fees was a voluntary act and not taxable." Hertzberg *v.* Elvidge, 80 Misc. 290.

CHAPTER XXVI

EXECUTORS AND ADMINISTRATORS

§ 201. Statutory provisions.

Sections 1835 and 1836 read as follows:—

§ 1835. Where a judgment for a sum of money only is rendered against an executor or administrator, in an action brought against him in his representative capacity, costs shall not be awarded against him, except as prescribed in the next section.

§ 1836. Where it appears in a case specified in the last section that the plaintiff's demand was presented within the time limited by a notice, * * * requiring creditors to present their claims and that the payment thereof was unreasonably resisted or neglected, the court may award costs and disbursements or disbursements without costs against the executor or administrator * * *. Where the action is brought in the supreme court or any county

court, the facts must be certified by the judge or referee before whom the trial took place.

§ 202. Entitled to a complete trial.

These sections of the Code entitle executors and administrators to exemption from costs of one trial which fully determines their liability and stands the test of appeal if any is taken. So that where judgment against executors was with costs to abide the event and a new trial ordered, and upon the second trial judgment was again obtained against the executors, the special term had no power to award costs against the executors because the "event" meant not only the final success in the action but also as to whether costs can be allowed against executors under section 1836 of the Code. Benjamin *v.* VerNooy, 168 N. Y. 578.

§ 203. Unreasonably resisting claim.

It must appear that the administrator or executor did not unreasonably resist the claim of the creditor or in laying claim to the fund, otherwise costs and extra allowances may be awarded against him. Von Schuckman *v.* Heinrich, 93 A. D. 278–281.

§ 204. Certificate of judge or referee must be furnished.

A certificate of the judge or referee before whom the case was tried showing the facts upon which the award was made must be furnished before costs may be awarded in favor of a claimant against an estate. Scheu *v.* Blum, 119 A. D. 825. An oral direction or verbal statement of the court that the plaintiff is entitled to costs against an executor is not sufficient. The direction must be in writing. Cornwell *v.* Sheldon, 134 A. D. 58.

Under § 2681 of the Code the executor or administrator must serve notice in writing upon the claimant that he rejects the claim or some part of it, which he specifies.

§ 205. When taxation against an executor or administrator allowed.

Where an action is brought by an executor or administrator for an act or claim that occurred after the death of the testator such action is, for the purposes of taxation, regarded as an action by him individually, and if he is unsuccessful costs may be taxed against him individually without application to the court. Dunphy *v.* Callahan, 126 A. D. 11, affirmed in 194 N. Y. 587.

§ 206. When executor or administrator is liable for appeal costs.

An executor or administrator who appeals and is wholly unsuccessful assumes the risks of an appellant and is liable for the costs. Benjamin *v.* Ver Nooy, 168 N. Y. 578–582.

§ 206a. Exemption from payment of costs limited.

Sections 1835 and 1836 of the Code apply only with reference to actions and rights existing at the time of the death of the deceased. They have no reference to claims arising out of the personal acts of the representative. In the latter case costs are awarded in accordance with section 3246 of the Code, in the same way as in an action by or against a person prosecuting or defending in his own right. Dunn *v.* Arkenburgh, 62 N. Y. S. 861.

CHAPTER XXVII

FORMA PAUPERIS

§ 207. Statutory provisions.

The provisions as to the liability of a party suing as a poor person is in section 461 of the Code, which reads:—

> A person so admitted, may prosecute his action, without paying fees to any officer; and he shall not be prevented from prosecuting the same, by reason of his being liable for costs of a former action, brought by him against the same defendant. If judgment is rendered against him, or his complaint is dismissed, costs shall not be awarded against him.

§ 208. Order must be presented on taxation or served on adverse party.

The order allowing the party to sue as a poor person must be served on the adverse party or presented to the officer on taxation, otherwise judgment entered for costs

taxed on a dismissal of a complaint will not be disturbed. Neugrosche *v.* Manhattan Ry. Co., 1 State Rep. 302.

§ 209. When costs may be taxed.

The entry of an order granting leave to sue as a poor person does not deprive the court of authority to impose costs as a condition of granting an order discontinuing the action. Parkinson *v.* Scott, 5 Misc. 261.

Likewise the court has power to impose costs against such a person as a condition upon which a judgment by default will be opened. Elwin *v.* Routh, 1 Civil Pro. Rep. 131. So also notwithstanding the order, the court has the authority to impose costs on the granting of an order amending the complaint. Coyle *v.* Third Ave. R. R. Co., 19 Misc. 345.

§ 210. Not relieved from payment of costs accrued prior to granting of order.

The provisions of the section do not exempt the party from payment of costs which accrued in the action prior to leave granted to prosecute *in forma pauperis.* Lyons *v.* Murat, 54 How. Pr. Rep. 368.

The party may also be charged with costs incurred in setting aside his proceedings for irregularity, for a contempt, or for striking out scandalous matter. Richardson *v.* Richardson, 5 Paige, 58.

§ 211. In appellate court.

As to costs in appellate courts the Code of Civil Procedure provides:—

> Sec. 466. An order, made as prescribed in this article, does not authorize the petitioner to take or

maintain an appeal, as a poor person; but where an appeal is taken by the adverse party, the order is applicable, in favor of the petitioner, as respondent in the appeal.

Sec. 467. Where costs are awarded in favor of a person, who had been admitted to prosecute or defend as a poor person, as prescribed in this article, they must be paid over to his attorney, when collected from the adverse party, and distributed among the attorney and counsel assigned to the poor person, as the court directs.

§ 212. Costs of an unsuccessful appeal are taxable.

Therefore, in accordance with the above provisions, a party who sues as a poor person has a right to appeal from a judgment, but he is not relieved from paying the costs of an unsuccessful appeal. Hayden *v.* Hayden, 8 A. D. 547; Morse *v.* City of Troy, 38 Hun, 301.

§ 213. When recovery is less than fifty dollars.

A plaintiff who has been allowed to sue *in forma pauperis* cannot be held liable for costs when his recovery in an action for personal injury is less than fifty dollars. Such a case is governed by the provisions of section 461 of the Code. Weltman *v.* Posenbecker, 19 Misc. 592; this case reverses same case reported in 18 Misc. 599.

CHAPTER XXVIII

DISBURSEMENTS

§ 214. Statutory provisions.

Section 3256 of the Code provides that:—

> A party to whom costs are awarded in an action

is entitled to include in his bill of costs his necessary disbursements as follows:

The legal fees of witnesses and of referees and other officers.

The reasonable compensation of commissioners taking depositions.

The legal fees for publication where publication is directed pursuant to law.

The legal fees paid for a certified copy of a deposition, or other paper, recorded or filed in any public office, necessarily used or obtained for use on the trial.

Copies of opinions and charges of judges.

The reasonable expenses of printing the papers for a hearing, when required by a ruling of the court.

Prospective charges for expenses of entering and docketing the judgment.

Sheriff's fees for receiving and returning one execution thereon, including the search for property and such other reasonable and necessary expenses, as are taxable, according to the course and practice of the court, or by express provision of law * * *.

§ 215. Authority of taxing officer to tax disbursements.

The taxing officer has no authority to tax the disbursements of a party unless costs have been awarded to him as the recovery of disbursements follow the recovery of costs. Burns *v.* D., L. & W. R. R. Co., 135 N. Y. 268; Warren *v.* Chase, 8 Misc. 520.

It follows that where a party to an action succeeds to

the extent that he is entitled to general costs and disbursements, every legal disbursement incurred in good faith in the case follows and cannot be defeated by showing that it was incurred in an unsuccessful attempt to establish a separate cause of action as to which the party fails. Burns *v.* D., L. & W. R. R. Co., 135 N. Y. 268.

The only disbursements, however, which a party can tax are those which he has incurred, or will incur, in the entry of judgment, and the issuance of process for its collection. Clegg *v.* Aiken, 11 St. Rep. 354, aff'd in 109 N. Y. 612.

§ 216. Affidavit as to disbursements must accompany bill of costs.

The bill of costs must be accompanied by an affidavit as to the necessity and the reasonableness of the items of disbursements. The clerk may disallow items not shown to be "reasonable in amount," but he is not authorized to reduce because he believes the charge to be excessive. Raff *v.* Koster Bial & Co., 27 Misc. 47.

§ 217. An award of costs includes disbursements.

A recovery of disbursements cannot stand except upon a recovery of costs. Nichols *v.* Moloughney, 85 A. D. 1. Therefore when a court awards costs it is not necessary to set forth the items allowed, these are to be ascertained upon taxation, nor is it necessary to specify that disbursements as well as costs are allowed. Under section 3256 of the Code costs in an action carries with it disbursements. Matter of Babcock, 86 A. D. 564.

§ 218. Clerk's taxation of disbursements not disturbed.

Where the affidavit of the successful party as to dis-

bursements stating that the amounts paid are correct, true, and reasonable, and actually and necessarily incurred, is met by an affidavit of the opposing party that the amount was not necessarily paid or incurred, the action of the clerk in taxing the amounts will not be disturbed. Rose *v.* Swarthout, 73 Misc. 583.

§ 219. Service of summons.

Costs incurred for the service of summons and complaint are taxable only on entry of final judgment. Hill *v.* Muller, 53 Misc. 262. Allowance for mileage is 6 cents for each mile travelled. Brown *v.* Mapelson, 2 City Ct. Rep. 404. (Section 3307, subdivision 1 of the Code.)

(a) Additional costs for additional defendants.

The additional costs of two dollars allowed for each additional defendant served not exceeding ten should only be allowed for defendants necessarily made parties to the suit, and it is not too late to urge this objection on the adjustment of costs. (Section 3251, subdivision 1.) Case *v.* Price, 17 How. Pr. Rep. 348.

(b) Effect of voluntary appearance of defendants.

A voluntary appearance by a defendant is held to be equivalent to personal service of summons so far as this item of costs is concerned. Schwinger *v.* Hickox, 46 How. Pr. Rep. 114.

§ 220. Disbursements for service of subpœna not allowed.

The expense incurred by a party in serving subpœnas upon witnesses is not taxable by the clerk as necessary

disbursements. Town of Pierrepont *v.* Loveless, 4 Hun, 681.

§ 221. Premiums paid on bond or undertaking not taxable.

The premium paid a surety company which furnished the requisite statutory undertaking given by the plaintiff in order to replevy chattels, is not properly taxable as an item of disbursement in the action. Bick *v.* Reese, 52 Hun, 125.

Likewise the amount paid a surety company for furnishing an appeal bond must be disallowed on taxation of costs as there is no authority for allowing them. Lee Injector M'f'g Co. *v.* Penberthy Injector Co., 109 Federal Rep. 964, cited with approval in Louisville Lumber Co. *v.* Smith, 154 A. D. 386, p. 387.

Same rule applies where a foreign corporation, suing in the courts of this state, was ordered to file an undertaking as security for costs; the amount it paid as a premium to a surety company for furnishing the undertaking, cannot be taxed. Louisville Lumber Co. *v.* Smith, 154 A. D. 386.

§ 222. Disbursements for official searches allowed.

Disbursements for searches made by title insurance companies organized under the laws of the State of New York are authorized by section 3256 of the Code, but disbursements for other searches are not authorized and cannot be taxed. Unofficial searches or examinations of titles to property are not taxable. Friedman *v.* Borchard, 161 A. D. 672; Equitable Life Assurance Society *v.* Hughes, 125 N. Y. 106.

An official search by a proper officer in a sister state is taxable. Rose *v.* Swarthout, 73 Misc. 583.

§ 223. Stenographer's fees.

There is no statutory authority taxation of stenographer's fees, and moneys paid therefor cannot be taxed except by consent. Seasongood *v.* Elevated R. R. Co., 46 N. Y. St. Rep. 832.

This rule has, however, been relaxed so as to permit the costs of stenographer's minutes to be taxed when they are procured for the preparation of a case on appeal or amendments thereto, or by order of the court. Hertzberg *v.* Elvidge, 80 Misc. 290. The authority therefor may be found in section 3256 of the Code which recites that "the reasonable expenses of printing the papers for a hearing, when required by a ruling of the court" may be taxed, as well as the additional provision that "such other and reasonable and necessary expenses, as are taxable, according to the course and practice of the court, or by express provision of law." Equitable Life Assurance Society *v.* Hughes, 125 N. Y. 106.

A necessary disbursement is such as a party is compelled to make or incur in the course of an action up to entry of final judgment. Delcomyn *v.* Chamberlain, 48 How. Pr. 409.

§ 224. Stenographer's minutes to prepare amendments.

Disbursements of a respondent in procuring stenographer's minutes in order to prepare amendments to a proposed case are properly taxed on an affirmance of the judgment, although he did not first request the loan of the appellant's copy. If the appellant would save him-

self from liability from such disbursements he must tender the minutes to the respondents. Starkweather *v.* Sundstorm, 113 A. D. 401; Ridabock *v.* Metropolitan Elevated R. R. Co., 8 A. D. 309.

When, therefore, the minutes having been printed by the appellants and offered to respondent, and the latter having refused to accept them, the respondent will not be permitted to tax such disbursements. Park *v.* N. Y. Central & H. R. R. R. Co., 33 Misc. 320.

But where respondent asked the appellants for the stenographer's minutes to prepare amendments to a proposed case and was refused, the disbursements incurred in procuring such minutes were allowed to be taxed. Park *v.* N. Y. C. & H. R. R. R. Co., 57 A. D. 569.

Although such minutes were ordered and used during the progress of the trial, nevertheless if they were ordered for the purpose and with a view of preparing amendments to the case on appeal such disbursements may be taxed. Pratt *v.* Clark, 124 A. D. 248.

A party will not, however, be allowed to tax the costs of minutes when it appears by the uncontroverted affidavit of his opponent that the party ordered and received a copy of the minutes from day to day during the trial, even though the affidavit states that the minutes were necessarily obtained and actually used in preparing amendments to the proposed case on appeal. "Of course it may be made to appear that, although the minutes are ordered during the trial, they were so ordered and received with an eye to the preparation of amendments to a case on appeal (Pratt *v.* Clark, *supra*) if that shall be the event, but we think that the affidavit in this case was not sufficient to so satisfy the court."

L. I. Contracting & Supply Co. *v.* The City of New York, 142 A. D. 1.

§ 225. Minutes to be used on another trial.

The expense of procuring the stenographer's minutes of the first trial for use on the second trial is not a taxable disbursement. Gilmour *v.* Stettler, 58 Misc. 361. Nor is the plaintiff entitled to tax the stenographer's fees for furnishing the minutes of one trial for use on a subsequent trial. Hudson *v.* Erie R. R. Co., 57 A. D. 98. Likewise the minutes of a trial which resulted in the disagreement of the jury cannot be taxed. Herrmann *v.* Herrmann, 88 A. D. 77.

§ 226. Disbursements allowed when procured by direction of court.

Stenographer's minutes procured by order or direction of the court for the purpose of being used either on a motion or a trial may be taxed. So that where, on a motion for a new trial, there is a dispute as to the testimony of one of the witnesses, and the court directs one of the counsel to furnish the testimony, the stenographer's fees for transcribing such evidence is part of the taxable costs. Vibbard *v.* Kruser Construction Co., 145 A. D. 673; Johnson *v.* N. Y. Elevated R. R. Co., 10 Misc. 136.

§ 227. Stipulation as to payment of fees.

A stipulation that a referee's fees and stenographer's fees shall "be taxed as a disbursement in the action" should be construed to mean that the party ultimately liable for costs shall also be liable for these disburse-

ments. Megrue *v.* Megrue, 160 A. D. 817. The amount paid by a party for stenographer's fees on a reference is taxable where it was stipulated that the successful party might include the item in his bill. Wolf *v.* Horn, 9 Misc. 100; Brown *v.* Sears, 23 Misc. 550.

After a motion for a new trial on the judge's minutes it was stipulated that a copy of the case made and settled for such motion might be used on a motion for a new trial on the ground of newly discovered evidence, a copy of the stenographer's minutes was unnecessary for the latter motion and the charge therefor should not be taxed as a disbursement. Brennan *v.* Joline, 70 Misc. 537.

§ 228. Stenographer's fees on a reference.

Stenographer's fees in a reference under section 1015 of the Code, cannot be imposed on either party because section 3251 of the Code makes no provision for same. Anderson *v.* E. DeBraekeleer & Co., 25 Misc. 343.

The cost of printing the copies of the referee's report and opinion and judgment can only be taxed by virtue of a written agreement signed by the attorneys for all the parties. Veeder *v.* Mudgett, 27 Hun, 519.

Stenographer's fees on a reference may be taxed where a stipulation has been entered into that the successful party may include the item in his bill. Brown *v.* Sears, 23 Misc. 559.

§ 229. Excess rate nor transcript of summation allowable.

The costs of a transcript of a summation is not taxable as it is not a proper part of a case on appeal. Nor

are the sums paid in excess of the statutory rate of ten cents a folio, to procure expedition in order that the minutes might be used during the trial, taxable as a disbursement on appeal. Pratt *v.* Clark, 124 A. D. 248.

§ 230. Printing may be allowed on appeal from order.

Upon an appeal from an order the court may allow printing disbursements but it must be expressly allowed and direct the taxation thereof, otherwise none can be taxed. Cassidy *v.* McFarland, 139 N. Y. 201; Brennan *v.* Joline, 70 Misc. 537.

§ 231. Proof of expense to be submitted.

Where several defendants unite in an appeal and some are successful and some are not, the successful parties will not be allowed to charge for printing unless they submit proof that they incurred the expense. Kane *v.* Met. El. R. R. Co., 7 N. Y. S. 653.

§ 232. Appeal of several defendants on same papers.

Where two defendants appeal on the same set of papers and the judgment is affirmed as to one and reversed as to the other, the expense of printing should be divided equally between them, so that one-half of the expense might be taxed by the party who succeeded to obtain the reversal. It should be shown that the expense was paid and incurred by both appellants. Kane *v.* Metropolitan El. R. R. Co., 28 N. Y. State Rep. 399.

§ 233. Same document used in several actions.

Where documents upon trial of each of several actions brought by different plaintiffs against the same de-

fendant and the cost for procuring them was $160, held in the absence of proof that the sum was paid in each case, the amount should have been taxed once only. Jermain *v.* Lake Shore & M. S. R. R. Co., 31 Hun, 558.

§ 234. No allowance to be made for service of papers on attorney.

No allowance should be made for the service of an answer or order upon the defendant's attorney personally, and the disbursements incurred cannot be taxed unless there is a peculiar necessity for personal service. Fuller Buggy Co. *v.* Waldron, 49 Misc. 278.

§ 235. Jury fees.

The item of jury fees is an actual disbursement and should be allowed whenever it is incurred, and the fact that the jury disagreed for which the fee is charged is immaterial. Hudson *v.* Erie R. R. Co., 57 A. D. 98. The successful party is entitled to tax as many jury fees as he paid although the verdict is set aside by reason of the misconduct of the jury. Hudson *v.* Erie R. R. Co., *supra.*

CHAPTER XXIX

DISBURSEMENTS FOR ATTENDANCE OF WITNESSES

§ 236. Statutory provisions.

Sec. 3267. A charge for the attendance of a witness, cannot be allowed without an affidavit, stating the number of days of his actual attendance; and, if travel fees are charged, the distance for which they are allowed. A charge for a copy of a document or paper, cannot be allowed, without an

affidavit, stating that it was actually and necessarily used or was necessarily obtained for use. An item of disbursement in a bill cannot be allowed in any case, unless it is verified.

Sec. 3318. A witness in an action or special proceeding, attending before a court of record, or a judge thereof is entitled, except where another fee is specially prescribed by law, to fifty cents for each day's attendance; and if he resides more than three miles from the place of attendance, to eight cents for each mile going to the place of attendance.

§ 237. Affidavit must accompany the bill of costs for attendance of witnesses.

Following the provisions of the section of the Code, a charge for the attendance of a witness cannot be allowed without an affidavit stating the number of days of his actual attendance, and if travelling fees are charged, the distance for which they are allowed. Inderlied *v.* Whaley, 17 Civ. Pro. Rep. 377, and cases cited therein; Taaks *v.* Schmidt, 25 How. Pr. 340.

An affidavit which fails to state that the witnesses are material, is insufficient to authorize the taxation of the fees. Wheeler *v.* Lozee, 12 How. Pr. 446; O'Loughlin *v.* Hammond & Co. (No. 2), 12 Civ. Pro. Rep. 171. The affidavit should also disclose that the party paid witness fees or was liable therefor. Inderlied *v.* Whaley (*supra*).

When conflicting affidavits are submitted it is the duty of the clerk to decide whether the witnesses were necessarily subpœnaed or whether they were procured with a view to increase the costs. Crosley *v.* Cobb, 37 Hun, 271.

The payment of fees to witnesses by a party, after the case is disposed of in his favor, when he is not legally liable to pay for them, does not entitle him to have such fees allowed him as part of his disbursements. Agricultural Insurance Co. *v.* Bean, 45 How. Pr. 444.

§ 238. Stipulation by parties as to fees.

Where the parties to the action have entered into a stipulation as to fees to be paid to witnesses, the taxing officer may allow the charges in accordance therewith although they provide for the payment of larger fees than the law fixes. Wolff *v.* Horn, 9 Misc. 100; Mark *v.* City of Buffalo, 87 N. Y. 184; Burt *v.* Oneida Community, 59 Hun, 234.

§ 239. Witness subpœnaed but not called to testify.

The fact that the witnesses were not sworn and called to testify on the trial is presumptive evidence that they were not necessary and the fees paid to them are not taxable unless their materiality is shown and sufficient reason shown why they were not called upon to testify. Kohn *v.* Manhattan R. Co., 8 Misc. 421.

§ 240. Witness fees allowed.

(a) Adverse party.

Witness fees may be allowed for subpœnaing an adverse party. Howlet *v.* Brown, 7 Abb. Pr. 74.

(b) Stockholder of corporation.

Fees will also be allowed for subpœnaing stockholders of a corporation. Midbury *v.* Butternuts & S. T. Co., 1 How. Pr. 231.

(c) **Officers of a corporation.**

Fees for officers of a corporation will be allowed where the affidavit shows that their fees have been paid or will be paid. Cheever *v.* Pittsburgh S. & L. E. R. Co., 26 N. Y. S. 829.

§ 241. Witness fees disallowed.

(a) **Party in the action.**

A party to the action cannot tax as a disbursement a witness fee for himself. (Section 3288.) Alexander *v.* Henry, L. J. Feb. 24, 1915.

(b) **Co-defendants.**

Witness fees for the attendance at a trial of co-defendants who were not subpœnaed should not be allowed where it does not appear that they attended as witnesses and not as parties. Fuller Buggy Co., 49 Misc. 279.

(c) **Attorneys of record.**

Section 3288 of the Code provides that a party is not entitled to tax witness fees for his own attendance, nor is an attorney of record entitled to fees for attending as a witness in behalf of his client. But where the attorney has rendered services of such a nature that they might have been performed by one not an attorney, witness fees therefor may be taxed. Kennedy *v.* Jarvis, 126 A. D. 551.

§ 242. Expert testimony.

Sums paid for plans and measurements, and for compensation of experts beyond their fees as witnesses are

not properly taxable as a "necessary disbursement." Mark *v.* City of Buffalo, 87 N. Y. 184. Nor payments made to engineers and surveyors for surveys made for the purpose of trial. Rothery *v.* N. Y. Rubber Co., 90 N. Y. 30. Nor the cost of a sketch of a scene of accident which was introduced at the trial in evidence. Sinne *v.* City of New York, 8 Civ. Pro. Rep. 252n.

§ 243. Allowance of mileage; affidavit of mileage necessary.

Section 3267 of the Code precludes the taxation for mileage paid to a witness unless an affidavit is filed stating the distance for which mileage has been allowed in the bill of costs, and the practice requires that the affidavit shall state the distance from the place of residence of each witness to the courthouse. Smith *v.* Hutton, 134 A. D. 445; Taaks *v.* Schmidt, 25 How. Pr. 340.

§ 244. Mileage allowed one way once only.

Section 3318 of the Code providing for fees and mileage to be paid to witnesses authorizes the taxation of mileage of one day's attendance only, even though the witness travelled daily to and from the place of trial. The *per diem* fee of fifty cents is the only allowance to the witness while in attendance at court. O'Rourke *v.* Degnon R. & T. Improvement Co., 139 A. D. 695.

Under section 3318 providing for witness fees a party is not entitled to tax mileage for trips to and from their homes during the adjournment from Friday afternoon to the following Monday. Booth *v.* H. S. Kerbaugh, 143 N. Y. S. 624.

The mileage of a witness residing more than three

miles from the place of attendance is to be computed from the place of residence irrespective of the place of service of the subpœna. Ahrens *v.* Coleman, 66 Misc. 569; Pike *v.* Nash, 16 How. Pr. 53.

§ 245. Mileage computed from place of actual residence.

A witness having no temporary residence at his place of business is entitled to mileage from his place of actual residence. But if he has a temporary residence at his place of business from which he may be subpœnaed and to which he must return, that is his residence for the purpose of figuring mileage. Smith *v.* Hutton, 134 A. D. 445.

§ 246. Mileage for foreign witness.

In case of a foreign witness the mileage to be allowed is the distance from the point where a person coming from his place of residence usually enters the state, to the court-house by the usual route. Taaks *v.* Schmidt, 25 How. Pr. 340.

§ 247. Fees must appear to have been paid or will be paid.

A defendant railroad which transported its witnesses to the places of trial on free passes is not entitled to tax their mileage because of the mere possibility that it may thereafter be called upon to pay. Valk *v.* Erie R. R. Co., 128 A. D. 470.

Where there is no evidence whatever on the taxation of costs to warrant a conclusion as to the mileage of the sheriff, the taxation of such mileage is erroneous. Hakonson *v.* Met. St. Ry. Co., 40 Misc. 182.

§ 248. Testimony taken at residence of witness.

Where a referee is appointed to take testimony at the residence of a witness, the travelling expenses incurred in conveying the referee to and from the residence of the witness may be taxed. Reichel v. N. Y. Cent. & H. R. R. R. Co., 18 Civ. Pro. Rep. 256.

§ 249. Disbursements not included in motion costs.

Section 3256 of the Code does not apply to motions. Cassidy *v.* McFarland, 139 N. Y. 201; Ward *v.* Ward, 23 Civ. Pro. Rep. 61.

Where disbursements are awarded on a motion they must be specifically directed to be taxed by the clerk. Ward *v.* Ward, *supra.* Where, therefore, an order of a referee was affirmed "with costs" only, the respondent was entitled to tax ten dollars and printing disbursements only (section 3251, subdivision 3, paragraph 9.) and while the court might have directed in the order that disbursements should be taxed by the clerk, without such direction, however, he had no authority to fix the amount. Cassidy *v.* McFarland, 139 N. Y. 201.

Likewise where an order of an appellate court dismisses an appeal with ten dollars costs of motion and affirms the *order* appealed from "with costs of the appeal to be taxed by the clerk of this court," the clerk may tax ten dollars motion costs of appeal, but he has no authority to tax disbursements for his fees on entering judgment, affidavits, satisfaction piece, sheriff's fees, etc. Zinsser *v.* Herrman, 24 Misc. 689.

The allowance of disbursements in the Surrogate's Court is governed by section 2743 of the Code which recites that costs when awarded by a decree, "shall

include all the disbursements of the party to whom they are awarded, which might be taxed in the supreme court." So that the surrogate has no authority to allow any disbursements except such as are taxable in the Supreme Court. Matter of Bender, 86 Hun, 570.

CHAPTER XXX

COLLECTION OF COSTS

§ 250. Execution against property.

Costs obtained in an action form part of, and become merged in the judgment, and are collected by execution in the same way and at the same time with the judgment. Execution may be issued against both the real and personal property of the judgment debtor.

Section 3262 provides in part that "Costs must be taxed by the clerk, upon the application of the party entitled thereto;" and the "clerk must insert, in the judgment or final order, the amount of the costs as taxed."

Section 1240 provides,

> In either of the following cases, a final judgment may be enforced by execution:
>
> 1. Where it is for a sum of money in favor of either party; or directs the payment of a sum of money.
>
> 2. Where it is in favor of the plaintiff, in an action of ejectment, or for dower.

3. In an action to recover a chattel, where it awards a chattel to either party.

§ 251. Supplementary proceedings.

Supplementary proceedings may be maintained to collect costs under section 2432 of the Code of Civil Pro., on entry of a money judgment as well as on entry of a final order. Matter of Stoddard, 128 A. D. 759. No such proceedings, however, can be maintained for costs awarded on an interlocutory order in an action, nor upon the return of an execution against personal property under section 779 of the Code of Civil Pro., relating to the enforcement of costs of a motion. Matter of Stoddard (*supra*).

§ 252. Motion costs.

No judgment can properly be entered for the costs of a motion. Hyde *v.* Anderson, 112 A. D. 76. An allowance of costs on a motion is not a judgment and is therefore not a lien on real property. Clinton *v.* South Shore M. G. & F. Co., 61 Misc. 339, p. 341.

The costs of a motion, therefore, which makes no final disposition of the merits of a cause of action, are not collectible by execution against real property nor by supplementary proceedings. Execution for such costs is governed by section 779 of the Code of Civil Pro. Bernard *v.* Cowen, 82 Misc. 384.

Section 779 reads as follows:—

> Where costs of a motion, or any other sum of money, directed by an order to be paid, are not paid within the time fixed for that purpose by the order, or, if no time is so fixed, within ten days after

> the service of a copy of the order, an execution against the personal property only of the party required to pay the same, may be issued by any party or person to whom the said costs or sum of money is made payable by said order, * * * , which execution shall be in the same form, as nearly as may be, as an execution upon a judgment, omitting the recitals and directions as to real property; and all the proceedings on the part of the party required to pay the same, except to review or vacate the order, are stayed without further direction of the court, until the payment thereof * * *.

Under section 3233, Code of Civil Pro., interlocutory costs awarded under section 3232, Code of Civil Pro., is governed by section 779 as if they were costs of a motion.

Costs on the determination of a demurrer may be granted absolutely but may not be collected until the trial of the other issue not yet disposed of. Cassavoy *v.* Pattison, 101 A. D. 128.

Section 779, Code of Civil Pro., applies to costs and disbursements of an appeal from an order of Special Term. Wasserman *v.* Benjamin, 91 A. D. 547; also to costs granted upon the denial of a motion for a new trial on newly discovered evidence. Bankers Money Order Ass. *v.* Nachod et al., 125 A. D. 373; Muller *v.* Brooklyn Heights R. Co., 139 A. D. 727.

But a direction by the court to pay a wife certain sums of money per week for her support during the pendency of the action as prescribed in sections 1772 and 1773, Code of Civil Pro., is not an order directing the payment of a "sum of money" within the meaning of section 779,

and an execution may not issue to enforce such order. Weber *v.* Weber, 93 A. D. 149.

§ 253. Contempt proceedings.

An attorney cannot be punished for contempt of court for failure to pay costs of a motion although he was so directed personally to pay the same; because section 779 provides how such costs may be collected. It must be done by execution except where special provision is otherwise made. Obermeyer & L. *v.* Adinsky, 123 A. D. 272.

Subdivision 3, of section 14 of Code of Civil Pro. limits the power of the court to punish as for a contempt for the "non-payment of a sum of money ordered or adjudged to be paid in a case where by law execution cannot be awarded for the collection of such sum." Kane *v.* Rose, 87 A. D. 101.

Nor can an attorney be punished for contempt of court for failure to repay motion costs when so ordered by the court. The method of collecting the same is provided for by the issuance of an execution therefor under section 779, Code of Civil Pro. Forstman *v.* Schulting, 42 Hun, 643.

§ 254. Matrimonial actions.

An attorney may maintain an action and obtain judgment for allowances made him by the court in an action for divorce, where there has been a collusive agreement by husband and wife whereby the alimony was released. He is not restricted for redress to section 779, Code of Civil Pro. Turner *v.* Woolworth, 153 A. D. 293. Such costs, however, cannot be collected by contempt proceedings. Weill *v.* Weill, 18 N. Y. Civ. Pro. Rep. 241.

But an attachment may issue for failure to pay alimony together with costs. Lansing *v.* Lansing, 41 How. Pr. 248; Flor *v.* Flor, 73 A. D. 262.

§ 255. Attorney's lien for costs.

An attorney has a lien for his costs upon the judgment recovered by him, and he is to be considered as an "equitable assignee of the judgment" to the extent of such lien. A payment to any one but the attorney will not act as a discharge of such lien. Marshall *v.* Meech, 51 N. Y. 140.

Therefore the lien of an attorney for services rendered and disbursements incurred in an action, are superior to that of the parties' right to set off judgments rendered against each other although between the same parties and the same attorneys. Smith *v.* Cayuga Lake Cement Co., 107 A. D. 524.

§ 256. Execution against the person.

Section 1487 of the Code of Civil Procedure, provides that,

> Where a judgment can be enforced by execution, as prescribed in section 1240 of this act, an execution, against the person of the judgment debtor may be issued thereupon * * * in either of the following cases:—
>
> 1. Where the plaintiff's right to arrest the defendant depends upon the nature of the action.
>
> 2. In any other case, where an order of arrest has been granted and executed in the action, and if it was executed against the judgment debtor, where it has not been vacated.

The plaintiff may, therefore, issue execution against the person of the defendant although an order of arrest was not granted in the action. Finkenmaur *v.* Dempsey, 8 N. Y. Civ. Pro. Rep. 418; Smith *v.* Duffy, 8 id. 191.

Where a defendant is liable to arrest and imprisonment on a judgment against him by the plaintiff, a judgment in favor of the defendant for costs may be enforced by an execution against the person of the plaintiff. Saffier *v.* Haft, 86 A. D. 284.

The defendant may, therefore, issue execution against the plaintiff for costs in an action in tort (Miller *v.* Woodhead, 5 N. Y. S. 88; Davids *v.* Brooklyn Heights R. Co., 92 N. Y. S. 220; Brown *v.* Brockett, 55 How. Pr. Rep. 32), for personal injuries (Saffier *v.* Haft, *supra;* Davids *v.* Brooklyn Heights R. Co., 104 A. D. 23). Defendant is entitled to the relief notwithstanding the fact that plaintiff has recovered a verdict in his favor where the amount of such recovery will entitle defendant to costs of the action. Philbrook *v.* Kellogg, 21 Hun, 238. In an action for assault resulting in defendant's favor, execution may issue although the assault was not committed by defendant personally but by his agents or employees. The right depends on the nature of the action. Davids *v.* Brooklyn Heights R. Co., 104 A. D. 23, aff'd 182 N. Y. 526; Losaw *v.* Smith, 109 A. D. 754. Execution will also be allowed for injury to personal property (Catlin *v.* Adirondack Co., 20 Hun, 19), for conversion (Knapp *v.* Murphy, 20 A. D. 83; Babcock *v.* Smith, 19 N. Y. S. 817).

Where the plaintiff is an infant and is suing by a guardian at litem, the latter is liable to an execution for costs in favor of defendant in the same manner as though he

was the plaintiff in the action. Miller *v.* Woodhead, 5 N. Y. S. 88.

§ 257. Mandamus.

A municipality may be compelled by mandamus to make requisition on the comptroller required by Chapter 728 of the Laws of 1896, for the payment of a bill of costs in condemnation proceedings. People ex rel. Allison *v.* Board of Education, 26 A. D. 208.

The provisions of section 2268 of the Code of Civil Pro., allowing the issuance of a warrant of commitment against a person "where the offense consists of a neglect or refusal to obey an order of the court, requiring the payment of costs, or of a specified sum of money, and the court is satisfied, by proof, by affidavit, that a personal demand thereof has been made, and that payment thereof has been refused or neglected," are limited by section 14, subdivision 3, of the Code of Civil Pro. to cases where no execution can be issued either under sections 1240 or 779 of the Code of Civil Procedure, for the collection of the sum ordered to be paid. Re Hess, 48 Hun 586.

ADDENDA

SHERIFF'S FEES

The following are some of the provisions with reference to sheriff's fees most frequently met with. They are contained in section 3307 of the Code in the following paragraphs:

Par. 1. For serving a summons with or without a copy of the complaint, or a notice, one dollar.

But in the counties of New York, Kings, Bronx, Queens and Richmond, one dollar and a half.

For serving or executing an order of arrest, or any other mandate for the service or execution of which no other fee is specially prescribed by law, except a subpœna, one dollar.

But in the counties of New York, Kings, Bronx, and Queens and Richmond, four dollars for each person served or as to whom it is executed.

For necessary travelling to serve or execute the processes six cents for each mile travelled, going and returning.

Par. 2. For levying a warrant of attachment, against the property of a defendant, or for executing a requisition to replevy one or more chattels, one dollar.

But in the counties of New York, Kings, Bronx, Queens and Richmond, five dollars.

Par. 5. For notifying jurors drawn to attend upon a writ of inquiry, or to try the validity of a claim to personal property, seized by virtue of a warrant of attachment or an execution, for each juror notified twenty-five cents. For attending a jury, two dollars.

But in the counties of New York, Kings, Bronx, Queens and Richmond, fifty cents for each juror notified. For attending a jury five dollars.

Par. 6. For receiving an execution against property, etc., fifty cents.

In the counties of New York, Kings, Bronx, Queens and Richmond, one dollar and fifty cents.

For mileage upon an execution for each mile, going only, ten cents.

Par. 10. For returning any mandate, which he is required by law to return, twelve cents; in the counties of New York, Kings, Bronx, Queens and Richmond, twenty-five cents.

For a certified copy of an execution and of the return of satisfaction thereupon, twenty-five cents; except in the counties of New York, Kings, Bronx, Queens and Richmond, fifty cents.

Chapter 418, L. 1892, subd. 2, sec. 17, provides that "where a warrant of attachment is vacated, set aside, or discharged by order of the court, poundage upon the value of the property attached not exceeding the amount specified in the warrant" may be taxed, and the court may make an order requiring the payment of the same. In all other cases where there is a liability for sheriff's fees and poundage, actions at law should be brought for the recovery of same. Keiser *v.* Schrier, L. J. Nov. 3, 1916.

Chapter 353, Laws of 1915, County Clerk's Fees, Bronx County.

Following are some of the more important fees that the Clerk of the County of the Bronx is entitled to charge in accordance with Chap. 353, Laws of 1915.

Filing transcript of judgment	$.05
For docketing, for each name against which it is docketed	.05
Certified transcript of judgment	.25
Filing instrument which cancels or amends a record	.10
For entering such cancellation, etc., for each name	.10
Certificate of discharge of lien	.25
Recording of papers, for each folio	.10
Certifying copies of records, etc., for each folio	.10
Certificate of notice of appearance	.50
Docketing deficiency on judgment of foreclosure	.25
Adjusting bill of costs	.25
Filing mechanic's lien	.10
Docketing same, for each name	.10
Entering judgment	.50

For certifying printed papers on appeal 3¢ a folio.

Chapter 446, Laws of 1906, Fees of the Clerk of the County of Kings.

Following are some of the more important fees that the Clerk of Kings County is entitled to charge and receive.

For filing transcript of judgment	$.05
For docketing, for each name against which it shall be docketed	.05
For transcript of judgment	.10
For filing instrument of cancellation, etc	.05
For entering such discharge, for each name	.10
Certificate of discharge of lien	.15
For recording papers, for each folio	.10
For copies of records on file, for each folio	.10
Docketing deficiency on judgment of foreclosure, etc	.25
Certificate of appearance in an action	.50
Adjusting bill of costs	.25
Docketing mechanic's lien	.50

COSTS ITEMIZED

Sections refer to the Code of Civil Procedure.

1. Costs before notice of trial.
   a. To plaintiff, if action comes within § 420 of the Code $15.00
   In every other action $25.00
   (Code, § 3251, subd. 1., par. 1)
   b. To defendant $10.00
   (Code, § 3251, subd. 2.)
2. Costs after notice of trial.
   To either party $15.00
   (Code, § 3251, subd. 3, par. 1.)
3. Additional defendants served, for each defendant
   Up to ten ..... $ 2.00
   Above ten ..... $ 1.00
   To be taxed by plaintiff only.
   (Code, § 3251, subd. 1, par. 2.)
4. Trial fee for an issue of fact to either party $30.00
   (Code, § 3251, subd. 3, par. 5.)
5. Trial fee for the trial of an issue of law to either party $20.00
   (Code, § 3251, subd. 3, par. 4.)
6. Allowance by statute; to the plaintiff in foreclosure proceedings, partition or adjudication upon a will or other instrument in writing, a determination of a claim to real property, or where there has been a warrant of attachment
   10% if amount is not over $200.
   5% on next $400.
   2% on the next $1000. (Code, §§ 3252, 3254.)
7. Allowance by court to either party (Code, §§ 3253, 3254.)
8. Motion costs, usually to either party $10.00
   (Code, § 3251, subd. 3, par. 9.)

9. Order of publication of summons, to the plaintiff.... $10.00
(Code, § 3251, subd. 1, par. 4.)
10. Trial occupying more than two days, to either party. $10.00
(Code, § 3251, subd. 3, par. 5.)
11. Procuring injunction order or order of arrest, to plaintiff..... $10.00
(Code, § 3251, subd. 1, par. 5.)
12. Appointment of guardian of infant defendant, to plaintiff..... $10.00
(Code, § 3251, subd. 1, par. 3.)
13. Examination of witness or party before trial, to either party..... $10.00
(Code, § 3251, subd. 3, par. 2.)
14. Attending and taking deposition, to either party..... $10.00
(Code, § 3251, subd. 3, par. 2.)
15. Drawing interrogatories to annex to a commission, to either party..... $10.00
(Code, § 3251, subd. 3, par. 3.)
16. Making and serving a case, to either party appellant $20.00
(Code, § 3251, subd. 3, par. 6.)
17. Making and serving amendments to case, to either party respondent..... $20.00
(Code, § 3251, subd. 3, par. 7.)
18. Making and serving a case of more than fifty folios, to either party appellant..... $30.00
(Code, § 3251, subd. 3, par. 6.)
19. Term fees, to either party.
    a. In the Supreme Court ten dollars for each term not exceeding five at which the case is tried.
    b. In the City Court only one term is allowed excluding the term at which it is tried.
    (Code, § 3251, subd. 3, par. 11.)
    c. In the Appellate Division ten dollars for each term not exceeding five, excluding the term at which the case is argued.
    (Code, § 3251, subd. 4.)

d. In the Court of Appeals ten dollars for each term not exceeding ten, excluding the term at which the case is argued.
(Code, § 3251, subd. 5, par. 3.)

20. Motion for new trial, to either party at special term
Upon a case before argument..... $20.00
Upon a case for argument..... $40.00
(Code, § 3251, subd. 3, par. 8, subd. 4.)

21. Proceedings before and after granting of a new trial to either party..... $25.00
(Code, § 3251, subd. 3, par. 10.)

22. Application for judgment on special verdict to either party
Before argument..... $20.00
For argument..... $40.00
(Code, § 3251, subd. 3, par. 8, subd. 4.)

23. Appeal to Appellate Term or Appellate Division, to either party
Before argument..... $20.00
For argument..... $40.00
(Code, § 3251, subd. 4.)

24. Appeal to Court of Appeals, to either party
Before argument..... $30.00
For argument..... $60.00
(Code, § 3251, subd. 5, par. 1.)

25. Damages in Court of Appeals for delay, to either party, not exceeding 10% of the amount of the judgment.
(Code, § 3251, subd. 5, par. 4.)

ITEMS OF DISBURSEMENTS

26. Paid for official searches..... $
(Code, §§ 3256, 3304.)

27. Paid referee's report, to either party..... $
(Code, §§ 3256, 3296.)

28. Paid referee's fees, to either party..... $
(Code, §§ 3256, 3296.)

29. Commissioner's fees, to either party..... $
(Code, § 3256.)

30. Clerk's fees on trial..... $ 1.00
No such fee in the City Court.
(Code, § 3301, par. 2.)

31. Clerk's fees on filing notice of pendency of action to plaintiff, 10c a folio..... $
(Code, § 3304.)

32. Clerk's fees for entering judgment, to either party... $ .50
(Code, § 3301, par. 3, § 3164a.)

33. Affidavits and acknowledgments, to either party
For affidavits, 12c each..... $
For acknowledgments, 25c each..... $
(Code, § 3298.)

34. Serving copies summons and complaint, to plaintiff,
In the counties of New York, Kings, Bronx, Queens and Richmond..... $ 1.50
In the other counties..... $ 1.00
6c. a mile allowed for each mile travelled, going and returning.
(Code, § 3307, subd. 1.)

35. Satisfaction piece, to either party
For filing, 25c, for certificate, 12c..... $ .37
(Code, §§ 3304, par. 9, 3301, par. 7, 3164a.)

36. Transcript of judgment and filing thereof, to either party
For transcript, 12c; for filing, 6c..... $ .18
(Code, § 3301, pars. 7, 8, §§ 3304, 3164a.)

37. Certified copy of judgment, to either party, 3c a folio, least charge 25c.
(Code, § 3305a.)

38. Certified copy orders, to either party, 3c a folio, least charge 25c.
(Code, § 3305a.)

39. Postage, to either party..... $
None allowed in the City Court.
(Code, § 3256.)

40. Jury fee (25c for each juror)..... $ 3.00
(Code, § 3313, allowed to party who pays fee.)

41. Stenographer's fees, to either party when ordered under stipulation of parties or by order of court, in 3rd, 4th, 5th, 6th, 7th, and 8th judicial districts, 6¢ a folio, in all the others 10¢ a folio.
(Code, §§ 3311, 3256.)

42. Sheriff's fees on execution, to either party in counties of New York, Kings, Bronx, Queens and Richmond

For receiving the execution.....	$ 1.50
For return.....	.25
Mileage 10¢ for each mile one way only.....	.10
	$ 1.85

In other counties.

For receiving execution.....	.50
For return.....	.12
Mileage 10¢ for each mile one way only.....	.10
	.72

(Code, § 3307, subds. 6, 10.)

43. Sheriff's fees on attachment or replevin.
(Code, § 3307, subds. 1 and 2.)

In New York, Kings, Queens, Bronx and Richmond counties

Attachment or replevin.

For levying warrant without summons.....	$ 5.00
For levying warrant with summons.....	6.50
For services of each additional warrant.....	1.50

Mileage 6¢ a mile each way.

For filing inventory or description of property. 50c folio

In other counties

For levying without summons.....	$ 1.00
For levying with summons.....	2.00

Mileage 6¢ each way.

For filing inventory or description of property. 25¢ a folio

44. Sheriff's fees on inquest before Sheriff's jury
For notifying jurors to attend in New York, Kings, Queens, Bronx and Richmond counties, 50¢. each ..... $ 6.00
In other counties, 25¢. each.
For attending a jury in New York, Kings, Queens, Bronx and Richmond counties... $ 5.00
In other counties $2.00.
(Code § 3307, subd. 5.)

45. Sheriff's term fee ..... .50
(Code, § 3307, subd. 4.)
In New York County this is included in fee paid on filing note of issue placing the case on the calendar. Where the sheriff receives an annual salary, this fee should not be charged.

46. Coroner's fees on execution, same as sheriff's..... $
(Code, § 3310.)

47. Extract from the minutes..... .10
(Code, §§ 3301, 3164a, par. 5.)

48. Paid for printing cases..... $
(Code, § 3256.)

49. Paid for printing points..... $
(Code, § 3256.)

50. Paid for copy of stenographer's minutes..... $
(Code, § 3256.)

51. Paid for copies of following papers..... $
Where there are more than ten defendants, the expense for printing the summons and complaint may be taxed.

52. Filing return to Court of Appeals..... $
(Code, § 3300.)

53. Paid for filing note of issue, to either party who paid fee, in New York and Bronx Supreme Courts and City Court..... $ 3.00
Kings County, no charge
Bronx County Court..... .75
(Code, § 3164a for City Court.)

54. Attendance of witnesses, to either party
Fees 50¢ a day and 8¢ a mile one way only if witness resides three miles or more from place of attendance.
(Code, § 3318.)

ADDITIONAL ITEMS NOT TO BE OVERLOOKED

55. Paid for publication of summons, etc..... $
(Code, § 3256.)

56. Exceptions ordered heard at Appellate Division
Before argument..... $20.00
For argument..... 40.00
(Code, § 3251, subd. 4.)

57. Appeal from an order of the City Court..... 10.00
(Code, § 3251, subd. 4, and § 3189.)

58. Increased costs, one-half additional..... $
(Code, §§ 3258, 3259.)

59. Recording mortgage in foreclosure..... $
(Code, § 3291.)

60. Filing notice of appeal in Court of Appeals..... .50
(Code, § 3300.)

61. Paid for remittitur Court of Appeals, 10c a folio..... $
(Code, § 3300.)

62. Paid for certifying printed record on appeal..... $
(3¢ a folio, Code, § 3305a.)

63. Clerk's fee for taxing costs, Kings and Bronx Counties $ .25
(Kings County, Chap. 446, Laws of 1906; Bronx County Court, Chap. 353, Laws 1915.)

Disbursements incurred in the City Court are governed by section 3164a of the Code; in Kings County, by Chap. 446, Laws 1906; and those in Bronx County, Chap. 353, Laws 1915.

FORMS

Code provisions and statutory enactments relating to each of the items will be found under "Itemized Costs" and "Itemized Disbursements" under the corresponding numbers.

FORM I

Bill of Costs Taxed by Plaintiff in an Action Within Sec. 420 of the Code, on Default of Defendant to Appear or Answer

Court

Plaintiff
against
Defendant
} Costs of

Costs

1a. Costs by statute..... $15.00
3. Costs for additional defendants served ($2 each)...

Disbursements

32. Clerk's fee on entry of judgment..... .50
33. Affidavits and acknowledgments (12¢ for affidavit, 25¢ for acknowledgment)..... $
34. Service of summons and complaint (In New York, Kings, Bronx, Queens, and Richmond counties) [1]..... 1.50

[1] In other counties, $1.00.

35. Satisfaction piece (25¢), certificate (12¢)..... .37
36. Transcript of judgment and filing thereof..... .18
42. Sheriff's fees on execution (New York, Kings, Bronx, Queens, and Richmond counties, $1.75 and 10¢ a mile) [1]

STATE OF NEW YORK }
COUNTY OF } ss:

.....the attorney for the.....in the above entitled action, being duly sworn, says that the foregoing disbursements have been made in said action or may be necessarily made or incurred therein and that they are reasonable in amount.

Sworn to before me this }
.....day of.....19 . }

Notice of Adjustment

Take notice, that the within is a copy of the items of the Costs and Disbursements in the within action, and that the same will be adjusted by the Clerk of the..... Court,.....at his office, in..... on the.....day of.....19..., at.....o'clock in the.....noon of that day and the amount inserted in the Judgment Roll.

Yours, etc.
Att'y for.....

To.....
Att'y for.....

FORM II

Bill of Costs Taxed by Plaintiff on Confession of Judgment by Defendant

The bill to be submitted is the same as Form I, except that there are no fees to be charged for the service of summons and complaint, nor any allowance for additional defendants served.

[1] In other counties, 62c and 10c a mile.

FORM III

Bill of Costs Taxed by Plaintiff in an Action not within Sec. 420 of the Code, Where an Inquest is Taken Before a Sheriff's Jury.

Court

Plaintiff
against
Defendant

Costs of

Costs

1a. Costs before notice of trial..... $25.00
3. Additional defendants served ($2 each)..... $

Disbursements

32. Clerk's fee on entering judgment..... .50
33. Affidavits and acknowledgments (12¢ for affidavit, 25¢ for acknowledgment)..... $
34. Service of summons and complaint (In New York, Kings, Bronx, Queens, and Richmond counties) [1]..... 1.50
35. Satisfaction piece (25¢) and certificate (12¢)..... .37
36. Transcript of judgment (12¢) and filing (6¢)..... .18
39. Postage (not allowed in City Court)..... $
40. Sheriff's jury..... 3.00
42. Sheriff's fees on execution (New York, Kings, Bronx, Queens, and Richmond counties, $1.75 and 10¢ a mile) [2]

[1] In other counties, $1.00.

[2] In other counties, 62c and 10c a mile.

44. Sheriff's fees ($6 for notifying Jurors, $5 for Sheriff's attendance, in New York, Kings, Bronx, Queens, and Richmond counties).....$ 11.00

STATE OF NEW YORK }
COUNTY OF } ss:

.....the attorney for the.....in the above entitled action, being duly sworn, says that the foregoing disbursements have been made in said action or may be necessarily made or incurred therein and that they are reasonable in amount.

Sworn to before me this..... }
day of..... 19 . }

(Note. "Notice of Adjustment to be found in Form I).

FORM IV

Bill of Costs for Plaintiff on a Trial before Court and Jury in an Action either Under Sec. 420 or Otherwise

Court

Plaintiff
against } Costs of
Defendant

Costs

1a. Costs before notice of trial ($15 in an action under § 420)..... $25.00
2. Costs after notice of trial..... 15.00
3. Additional defendants served ($2 for each defendant)
4. Trial of an issue of fact..... 30.00
8. Motion costs (if any, $10).....

9. Order of publication (if any, $10)	$
10. Trial occupied more than two days ($10)	
11. Procuring order of arrest (if any, $10)	
12. Appointment of guardian of infant defendant (if any, $10)	
13. Examination of witness or party before trial (if any, $10) [1]	
14. Attending and taking deposition (if any, $10) [2]	
15. Drawing interrogatories to annex to commission (if any, $10) [3]	
19. Term fees (only one term allowed in City Court)	10.00
20. Motion for a new trial (on newly discovered evidence, $60) [4]	
21. Proceedings after granting of and before new trial (if any, $25) [5]	

Disbursements

26. Paid for official searches (if any)	
27. Referee's report (if any)	
28. Referee's fees (if any, $10 a day)	
30. Clerk's fee (not in City Court)	1.00
32. Clerk's fee on entering judgment	.50
33. Affidavits (12¢) and acknowledgments (25¢)	
34. Serving copy summons and complaint (New York, Kings, Queens, Bronx and Richmond counties) [6]	1.50

[1] Taxable by the successful party although the order was obtained by the adverse party. Only one fee of $10 allowed although several witnesses may have been examined.

[2] Party or witness is entitled to the fee when he attends ready to be examined, although the examination is waived and is never had.

[3] But one charge can be made although separate interrogatories have been drawn for several witnesses.

[4] Costs allowed are the same as those allowed on appeal, $20 before argument and $40 for argument.

[5] This item may be taxed as many times as a new trial is had pursuant to an order of the court.

[6] In other counties, $1.00.

35. Satisfaction piece (25¢) and certificate of satisfaction (12¢) ..... $ .37
36. Transcript of judgment (12¢) and filing (6¢) ..... .18
38. Certified copies of orders (if any, 3¢ a folio, not less than 25¢) .....
39. Postage (not in City Court) .....
40. Jury fees 3.00
42. Sheriff's fees on execution (New York, Kings, Queens, Bronx, and Richmond counties $1.75 and 10¢ a mile) [1]
47. Extract from the minutes ..... .10
53. Filing note of issue 3.00
54. Witness fees, (50¢ a day and 8¢ a mile going one way) [2]
———————( ) days ( ) miles .....

STATE OF NEW YORK }
COUNTY OF } ss:

.....the Attorney for the.....in the above-entitled action, being duly sworn, says that the foregoing disbursements have been made or may be necessarily made or incurred in said action and are reasonable in amount, and that the persons named as witnesses, attended as such witnesses on the Trial of said action the number of days set opposite their names; that said persons resided the number of miles set opposite their names, from the place of said trial; and each of said persons, as such witness as aforesaid, necessarily travelled the number of miles so set opposite his name, in traveling to, and the same distance in returning from the said place of trial; and that the copies of document or papers as charged herein were actually and necessarily obtained for use.

Sworn to before me, this.....day of.....191 . }

(Note. " Notice of Adjustment " to be found in Form I.)

[1] In other counties, 62c and 10c a mile.

[2] Mileage allowed is 8c a mile going one way and only once, provided witness resides 3 miles or more from place of attendance. Witness fee is 50c a day for each day's attendance.

FORM V

Bill of Costs to Be Taxed by Defendant in an Action Tried before a Court and Jury

Court

Plaintiff
against
Defendant

Costs of

Costs

1b.	Costs before notice of trial	$10.00
2.	Costs after notice of trial	15.00
4.	Trial fee issue of fact	30.00
8.	Motion costs (if any, $10)	
10.	Trial occupied more than two days (if any, $10)	
13.	Examination of witnesses before trial (if any, $10) [1]	
14.	Attending and taking deposition (if any, $10) [2]	
15.	Drawing interrogatories to be annexed to commission ($10) [3]	
19.	Term fees (only one term fee allowed in the City Court)	10.00

[1] Taxable by the successful party although the order was obtained by the adverse party. Only one fee of $10 allowed although several witnesses may have been examined.

[2] Party or witness is entitled to the fee when he attends ready to be examined, although the examination is waived and is never had.

[3] But one charge can be made although separate interrogatories have been drawn for several witnesses.

20. Motion for a new trial on newly discovered evidence ($60) [1] .....
21. Proceedings after granting of and before new trial ($25) [2]

Disbursements

26. Paid for official searches	
27. Referee's report (if any)	
28. Referee's fees ($10 a day)	
29. Commissioner's fees (if any)	
30. Clerk's fees (not allowable in the City Court)	$ 1.00
32. Clerk's fees on entry of judgment	.50
35. Satisfaction piece (25¢), certificate of satisfaction (12¢)	.37
36. Transcript of judgment (12¢) and filing (6¢)	.18
37. Certified copy of judgment (if any, 3¢ a folio)	
38. Certified copies of orders (if any, 3¢ a folio)	
39. Postage (not in City Court)	
42. Sheriff's fees on execution (New York, Kings, Bronx, Queens, and Richmond counties $1.75 and 10¢ a mile) [3]	
47. Extract from the minutes	.10
54. Witness fees (50¢ a day and 8¢ a mile going one way) [4]	
————————( ) days ( ) miles	
————————( ) days ( ) miles	

STATE OF NEW YORK }
COUNTY OF } ss:

.....the Attorney for the.....in the above-entitled action, being duly sworn, says that the foregoing disbursements have been made or may be necessarily made or incurred in said action and are reasonable in amount, and that the persons

[1] Costs allowed are the same as those allowed on appeal, $20 before argument and $40 for argument.

[2] This item may be taxed as many times as a new trial is granted pursuant to an order of the court.

[3] In other counties, 62c and 10c a mile.

[4] Mileage allowed is 8c a mile going one way and only once, provided witness resides 3 miles or more from place of attendance. Witness fee is 50c a day for each day's attendance.

named as witnesses, attended as such witnesses on the Trial of said action the number of days set opposite their names; that said persons resided the number of miles set opposite their names, from the place of said trial; and each of said persons, as such witness as aforesaid, necessarily traveled the number of miles so set opposite his name, in traveling to, and the same distance in returning from the said place of trial; and that the copies of document or papers as charged herein were actually and necessarily obtained for use.

Sworn to before me, this.....day of.....191 .

(Note. "Notice of Adjustment" to be found in Form I).

FORM VI

Bill of Costs to be Taxed by the Plaintiff on an Inquest Before the Court and a Jury

The bill to be submitted is the same as Form IV.

If the Inquest is before a court without a jury, the trial fee of $30 should be taxed, but not a jury fee of $3.

FORM VII

Bill of Costs to be Taxed by Either Side on Entry of an Interlocutory Judgment

Court

Plaintiff
against
Defendant

Costs of

Costs

2. Costs after notice of trial..... $15.00
5. Costs for trial of an issue of law..... 20.00

FORM VIII

Bill of Costs to be Taxed by Appellant on Reversal of Judgment by the Appellate Term or Appellate Division

Court

Plaintiff
against
Defendant

Costs of

Costs

16.	Making and serving a case	$ 20.00
18.	Case more than fifty folios ($10 additional)	
23.	Costs before argument (in Appellate Term or Appellate Division)	20.00
23.	Costs for argument (in Appellate Term or Appellate Division)	40.00

Disbursements

32.	Clerk's fee on entry of judgment	.50
33.	Affidavits (12¢) and acknowledgments (25¢)	
35.	Satisfaction Piece (25¢) and Certificate of Satisfaction (12¢)	.37
36.	Transcript of judgment (12¢) and filing (6¢)	.18
42.	Sheriff's fees on execution (New York, Kings, Bronx, Queens, and Richmond counties, $1.75 and 10¢ a mile) [1]	

[1] In other counties, 62c and 10c a mile.

48. Paid printing cases [1].....$
49. Paid printing points [1].....
50. Paid for copy of stenographer's minutes [2].....

STATE OF NEW YORK
COUNTY OF } ss:

.....the attorney for the.....in the above entitled action, being duly sworn, says that the foregoing disbursements have been made in said action or may be necessarily made or incurred therein and that they are reasonable in amount.

Sworn to before me this.....
day of.....19 .

(Note. "Notice of Adjustment" to be found in Form I.)

FORM IX

Costs to be Taxed by Respondent on an Affirmance of Judgment either by the Appellate Term or Appellate Division

Court

Plaintiff
against
Defendant

Costs of

Costs

17. Preparing and serving amendments to the case..... $20.00

[1] The printer's receipted bill should be submitted to the taxing officer on taxation.

[2] No taxation of costs for moneys paid for the summation of attorneys nor for excess of legal rate because of special work, or hurry work.

23. Costs before argument (in Appellate Term or Appellate Division) ..... $ 20.00
23. Costs for argument (in Appellate Term or Appellate Division) 40.00

Disbursements

32. Clerk's fee on entry of judgment ..... .50
33. Affidavits (12¢) and acknowledgments (25¢) .....
35. Satisfaction piece (25¢) and certificate of satisfaction (12¢) ..... .37
36. Transcript of judgment (12¢) and filing (6¢) ..... .18
42. Sheriff's fees on execution (New York, Kings, Bronx, Queens, and Richmond counties, $1.75 and 10¢ a mile) [1] .....
49. Paid printing points [2] .....
50. Paid for copy of stenographer's minutes [3] .....

STATE OF NEW YORK }
COUNTY OF } ss:

.....the attorney for the.....in the above entitled action, being duly sworn, says that the foregoing disbursements have been made in said action or may be necessarily made or incurred therein and that they are reasonable in amount.

Sworn to before me this.....
day of.....19 .

(Note. "Notice of Adjustment" to be found in Form I.)

[1] In other counties, 62c and 10c a mile.

[2] The printer's receipted bill should be presented to the taxing officer on taxation.

[3] Neither attorney's summation nor excess rate is taxable. This item cannot be taxed when the appellant offered a copy of his minutes to the respondent with which to prepare his amendments and the latter refused to accept them.

FORM X

Bill of Costs to be Taxed by Defendant on Dismissal of Complaint Granted on Motion, for Failure to Prosecute the Action

Court

Plaintiff
against
Defendant

} Costs of

Costs

1b.	Costs before notice of trial	$10.00
8.	Motion costs	10.00
	(If issue has been joined and notices of trial served and cause placed on the calendar, the following items of costs are taxable.)	
2.	Costs after notice of trial	15.00
19.	Term fees (only one term in the City Court)	

Disbursements

23.	Clerk's fee on entering judgment	.50
33.	Affidavits (12¢) and acknowledgments (25¢)	
35.	Satisfaction piece (25¢) and certificate of satisfaction (12¢)	.37
36.	Transcript of judgment (12¢) and filing (6¢)	.18
42.	Sheriff's fees on execution (New York, Kings, Bronx, Queens, and Richmond counties, $1.75 and 10¢ a mile) [1]	

[1] In other counties, 62c and 10c a mile.

STATE OF NEW YORK
COUNTY OF } ss:

.....the attorney for the.....in the above entitled action, being duly sworn, says that the foregoing disbursements have been made in said action or may be necessarily made or incurred therein and that they are reasonable in amount.

Sworn to before me this.....
day of.....19 .

(Note. "Notice of Adjustment" to be found in Form I.)

FORM XI

Bill of Costs to be Taxed by the Defendant upon Dismissal of Complaint Either on Call of the Calendar or After a Trial of the Issues

Court

Plaintiff
against
Defendant
} Costs of

Costs

1b.	Before notice of trial	$10.00
2.	After notice of trial	15.00
4.	Trial of an issue of fact	30.00
19.	Term fee (only one term in City Court)	10.00

Disbursements

30.	Clerk's fee (not in the City Court)	1.00
32.	Clerk's fee on entering judgment	.50

33. Affidavits (12¢), acknowledgment (25¢)..... $
35. Satisfaction piece (25¢) and certificate of satisfaction (12¢)..... .37
36. Transcript of judgment (12¢) and filing (6¢)..... .18
39. Postage (not in the City Court).....
42. Sheriff's fees on execution (New York, Kings, Bronx, Queens, and Richmond counties, $1.75 and 10¢ a mile) [1].....
47. Extract from minutes..... .10

STATE OF NEW YORK }
COUNTY OF } ss:

.....the attorney for the.....in the above entitled action, being duly sworn, says that the foregoing disbursements have been made in said action or may be necessarily made or incurred therein and that they are reasonable in amount.

Sworn to before me this.....
day of.....19 .

(NOTE. "Notice of Adjustment" to be found in Form I.)

FORM XII

Bill of Costs to be Taxed by the Defendant on the Discontinuance of an Action by the Plaintiff

Court

Plaintiff
against
Defendant

} Costs of

[1] In other counties, 62c and 10c a mile.

Costs

1b. Before notice of trial	$10.00
2. After notice of trial	15.00
4. Trial fee (sometimes allowed) [1]	
19. Term fee [2]	10.00

A judgment for costs on the discontinuance of an action cannot be entered, nor can any disbursements be taxed.

FORM XIII

Bill to be Taxed by the Plaintiff on the Withdrawal of a Juror to Permit the Defendant to Amend His Answer

Court

Plaintiff
against
Defendant

} Costs of

Costs

1a. Before notice of trial (when within § 420 of Code, $15)	$25.00
2. After notice of trial	15.00
4. Trial of an issue of fact	30.00
19. Term fees (only one term in the City Court)	10.00

[1] A trial fee may be allowed where the case appears on the day calendar and is marked ready for trial and thereafter an order of discontinuance is entered.

[2] No term fee will be taxed when the order of discontinuance is entered the same term it appears on the calendar.

Disbursements

33. Affidavits (12¢) and acknowledgments (25¢)..... $
34. Service of summons and complaint (New York, Kings, Bronx, Queens, and Richmond counties) [1]... 1.50
38. Certified copy of order (if any).....
40. Jury fee..... 3.00
53. Note of issue..... 3.00
54. Witness fees (if any) [2].....
——————( ) days ( ) miles.....

STATE OF NEW YORK }
COUNTY OF } ss:

.....the attorney for the.....in the above-entitled action, being duly sworn, says that the foregoing disbursements have been made or may be necessarily made or incurred in said action and are reasonable in amount, and that the persons named as witnesses, attended as such witnesses on the Trial of said action the number of days set opposite their names; that said persons resided the number of miles set opposite their names, from the place of said trial; and each of said persons, as such witness as aforesaid, necessarily traveled the number of miles so set opposite his name, in traveling to, and the same distance in returning from the said place of trial; and that the copies of documents or papers as charged herein were actually and necessarily obtained for use.

Sworn to before me, this.....day }
of.....191 . }

(Note. "Notice of Adjustment" to be found in Form I.)

[1] In other counties, $1.00.

[2] Mileage allowed is 8c. a mile going one way and only once, provided witness resides 3 miles or more from place of attendance. Witness fee is 50c a day for each day's attendance.

FORM XIV

If after defendant pays the costs as terms for permission to amend his answer, the plaintiff finally succeeds in the action, he is entitled to tax a full bill as set forth in Form IV, except such disbursements which he has already charged on the previous taxation.

If the defendant is finally successful in the action, he is entitled to tax a full bill of costs as set forth in Form V.

FORM XV

Bill to be Taxed by Defendant on the Withdrawal of a Juror to Permit Plaintiff to Amend His Complaint

Court

Plaintiff
against
Defendant

} Costs of

Costs

1b.	Before notice of trial	$10.00
2.	After notice of trial	15.00
4.	Trial of an issue of fact	30.00
19.	Term fee (only one in the City Court)	10.00

Disbursements

33. Affidavits (12¢) and acknowledgments (25¢).....
38. Certified copy of order (if any).....

54. Witness fees (if any) [1].....
————————( ) days ( ) miles.....

STATE OF NEW YORK }
COUNTY OF } ss:

.....the Attorney for the.....in the above-entitled action, being duly sworn, says that the foregoing disbursements have been made or may be necessarily made or incurred in said action and are reasonable in amount, and that the persons named as witnesses, attended as such witnesses on the Trial of said action the number of days set opposite their names; that said persons resided the number of miles set opposite their names, from the place of said trial; and each of said persons, as such witness as aforesaid, necessarily traveled the number of miles so set opposite his name, in traveling to, and the same distance in returning from the said place of trial; and that the copies of documents or papers as charged herein were actually and necessarily obtained for use.

Sworn to before me, this.....day }
of.....191 . }

(Note. "Notice of Adjustment" to be found in Form I.)

FORM XVI

If after plaintiff pays the costs as terms for permission to amend his complaint, the defendant finally succeeds in the action, he is entitled to tax a full bill of costs as set forth in Form V, except such disbursements which have already been charged on the previous taxation.

If the plaintiff is finally successful in the action, he is entitled to tax a full bill of costs as set forth in Form IV.

[1] Mileage allowed is 8c a mile going one way and only once, provided witness resides 3 miles or more from place of attendance. Witness fee is 50c a day for each day's attendance.

FORM XVII

Bill of Costs to be Taxed by the Successful Party upon a Retrial of an Action had Pursuant to an Order of the Court granted upon Setting Aside a Verdict Rendered by a Jury

Court

Plaintiff
against
Defendant

Costs of

Costs

1a.	Before notice of trial [1] (when within § 420 of Code, $15)	$25.00
2.	After notice of trial	15.00
4.	Trial of an issue of fact (two trials)	60.00
19.	Term fees (only one fee in the City Court)	10.00
21.	Costs after the granting of and before a new trial	25.00

Disbursements

30.	Clerk's fee (not in the City Court)	1.00
32.	Clerk's fee on entering judgment	.50
33.	Affidavits (12¢) and acknowledgments (25¢)	
34.	Serving summons and complaint (New York, Kings, Bronx, Queens, and Richmond counties) [2]	1.50
35.	Satisfaction piece (25¢) and certificate (12¢)	.37
36.	Transcript of judgment (12¢) and filing (6¢)	.18
38.	Certified copy of order (if any)	

[1] Defendant is entitled to $10 only.

[2] Defendant is not entitled to this item.

40. Jury fees [1] ..... $ 3.00
42. Sheriff's fees on execution ($1.75 and 10¢ a mile) [2] . .
47. Extract from the minutes ..... .10
53. Note of issue [1] 3.00
54. Witness fees.[3] .....
———————( ) days ( ) miles .....

STATE OF NEW YORK }
COUNTY OF } ss:

..... the attorney for the .....in the above-entitled action, being duly sworn, says that the foregoing disbursements have been made or may be necessarily made or incurred in said action and are reasonable in amount, and that the persons named as witnesses, attended as such witnesses on the Trial of said action the number of days set opposite their names; that said persons resided the number of miles set opposite their names, from the place of said trial; and each of said persons, as such witness as aforesaid, necessarily traveled the number of miles so set opposite his name, in traveling to, and the same distance in returning from the said place of trial; and that the copies of document or papers as charged herein were actually and necessarily obtained for use.

Sworn to before me, this .....day }
of .....191 }

(Note. "Notice of Adjustment" to be found in Form I.)

[1] Defendant is not entitled to these items.

[2] In the counties of New York, Kings, Bronx, Queens, and Richmond only; in all the other counties only 62c and 10c. a mile.

[3] Fees allowed are 50c for each day's attendance, and 8c a mile one way only, provided the witness has to travel three miles or more.

FORM XVIII

Bill of Costs to be Taxed by the Successful Party upon the Re-trial of an Action Pursuant to an Order of Reversal by the Appellate Court, Ordering a New Trial with Costs to Abide the Event

Court

Plaintiff
against
Defendant

} Costs of

Costs

1a.	Before notice of trial [1] (when within § 420 of Code, $15)	$25.00
2.	After notice of trial	15.00
4.	Trial of an issue of fact (two trials)	60.00
16.	Making and serving a case on appeal [2]	20.00
17.	Preparing and serving amendments to a case [3]	20.00
18.	Case more than fifty folios [2] (10 additional)	10.00
19.	Term fees in trial court (only one in the City Court)	10.00
19.	Term fees in appellate court [4]	
21.	Costs after granting of and before new trial	25.00
23.	Before argument (in Appellate Term or Appellate Division)	20.00
23.	For argument (in Appellate Term and Appellate Division)	40.00

[1] Defendant to tax $10 only.
[2] Not to be taxed by respondent.
[3] Not to be taxed by appellant.
[4] No term fees in Appellate Term.

Disbursements

30. Clerk's fees (not in the City Court) [1]	$1.00
32. Clerk's fee on entering judgment	.50
33. Affidavits (12¢) and acknowledgments (25¢)	
34. Service of copy summons and complaint (New York, Kings, Bronx, Queens, and Richmond counties) [1]	1.50
35. Satisfaction piece (25¢), certificate (12¢)	.37
36. Transcript of judgment (12¢) and filing (6¢)	.18
38. Certified copy of order (if any)	
40. Jury fees (two juries) [1]	6.00
42. Sheriff's fees on execution ($1.75 and 10¢ a mile) [2]	
47. Extract from the minutes	.10
48. Paid printing cases [3]	
49. Paid printing points	
50. Paid copy stenographer's minutes	
53. Note of issue [1]	3.00
54. Witness fees, (50¢ for each day, 8¢ a mile going one way) [4]	
————————( ) days ( ) miles	

STATE OF NEW YORK
COUNTY OF } ss:

.....the attorney for the.....in the above-entitled action, being duly sworn, says that the foregoing disbursements have been made or may be necessarily made or incurred in said action and are reasonable in amount, and that the persons named as witnesses, attended as such witnesses on the Trial of said action the number of days set opposite their names; that

[1] Not to be taxed by defendant.

[2] In the counties of New York, Kings, Bronx, Queens, and Richmond only. In the other counties only 62c and 10c a mile.

[3] Not to be taxed by respondent.

[4] Mileage allowed is 8c a mile going one way and only once, provided witness resides 3 miles or more from place of attendance. Witness fee is 50c for each day's attendance.

said persons resided the number of miles set opposite their names, from the place of said trial; and each of said persons, as such witness as aforesaid, necessarily traveled the number of miles so set opposite his name, in traveling to, and the same distance in returning from the said place of trial; and that the copies of documents or papers as charged herein were actually and necessarily obtained for use.

Sworn to before me, this.....day of.....191 .

(Note. "Notice of Adjustment" to be found in Form I.)

FORM XIX

Bill of Costs to be Taxed on the Rendition of Judgment Absolute by the Appellate Division in an Action Brought in the City Court, Which was Reversed and New Trial Ordered by Appellate Term

Court

Plaintiff
against
Defendant

Costs of

Costs

1a.	Before notice of trial [1]	$25 or $15.00
2.	After notice of trial	15.00
4.	Trial of an issue of fact	30.00

[1] Defendant to tax only $10.00. If the action comes within § 420 of the Code, plaintiff to tax only $15.00.

16.	Making and serving a case [1]	$ 20.00
17.	Making and serving amendments to a case [2]	20.00
18.	Case more than fifty folios [1] (10 additional)	10.00
19.	Term fee at trial term (only once in the City Court)	10.00
19.	Term fees in Appellate Division (if any) [3]	
21.	Proceedings before and after granting new trial	25.00
23.	Appeal to Appellate Term before argument	20.00
23.	Appeal to Appellate Term for argument	40.00
23.	Appeal to Appellate Division before argument	20.00
23.	Appeal to Appellate Division for argument	40.00

Disbursements

32.	Clerk's fees on entering judgment	.50
33.	Affidavits (12¢) and acknowledgments (25¢)	
34.	Serving copy summons and complaint (in New York, Kings, Queens, Richmond, and Bronx counties) [4]	1.50
35.	Satisfaction piece (25¢) and certificate (12¢)	.37
36.	Transcript of judgment (12¢) and filing (6¢)	.18
40.	Jury fee [4]	3.00
42.	Sheriff's fees on execution ($1.75 and 10¢ a mile) [5]	1.85
47.	Extract from the minutes	.10
48.	Paid printing cases [6]	
49.	Paid printing points	
50.	Paid copy of stenographer's minutes [7]	
53.	Note of issue [4]	3.00

[1] To be taxed by appellant only.

[2] To be taxed by respondent only.

[3] No term fees in the Appellate Term.

[4] To be taxed by plaintiff only.

[5] In New York, Kings, Queens, Bronx, and Richmond counties only; in the others only 62c and 10c a mile.

[6] To be taxed by appellant only.

[7] Neither attorney's summation nor excess rate is taxable. This item cannot be taxed when the appellant offered a copy of his minutes to the respondent with which to prepare his amendments and the latter refused to accept them.

54. Witness fees, 50¢ for each day's attendance and 8¢ a mile one way.[1]

————————( ) days ( ) miles.....
————————( ) days ( ) miles.....

STATE OF NEW YORK }
COUNTY OF } ss:

.....the Attorney for the.....in the above-entitled action, being duly sworn, says that the foregoing disbursements have been made or may be necessarily made or incurred in said action and are reasonable in amount, and that the persons named as witnesses, attended as such witnesses on the Trial of said action the number of days set opposite their names; that said persons resided the number of miles set opposite their names, from the place of said trial; and each of said persons, as such witness as aforesaid, necessarily traveled the number of miles so set opposite his name, in traveling to, and the same distance in returning from the said place of trial; and that the copies of documents or papers as charged herein were actually and necessarily obtained for use.

Sworn to before me, this.....day }
of.....191 }

(Note. "Notice of Adjustment" to be found in Form I.)

[1] Mileage allowed is 8c a mile going one way and only once, provided witness resides 3 miles or more from place of attendance. Witness fee is 50c a day for each day's attendance.

FORM XX

Bill of Costs to be Taxed by the Successful Party on Entry of Final Judgment Upon an Interlocutory Judgment Overruling or Sustaining a Demurrer to a Pleading

Court

Plaintiff
against
Defendant

} Costs of

Costs

1a.	Before notice of trial [1]	$25 or $15.00
2.	After notice of trial	15.00
5.	Trial of an issue of law	20.00

Disbursements

32.	Clerk's fee on entering judgment	.50
33.	Affidavits (12¢) and acknowledgments (25¢)	
34.	Service of copy summons and complaint (in New York, Kings, Queens, Bronx, and Richmond counties) [2]	1.50
35.	Satisfaction piece (25¢), Certificate (12¢)	.37
36.	Transcript of judgment (12¢) and filing (6¢)	.18
42.	Sheriff's fees on execution ($1.75 and 10¢ a mile) [3]	

[1] Defendant to tax $10 only. If action comes within § 420 of the Code, plaintiff to tax only $15.

[2] Not to be taxed by defendant. In other counties only $1.00.

[3] In New York, Queens, Kings, Bronx, and Richmond counties only. In other counties only 62c and 10c a mile.

STATE OF NEW YORK }
COUNTY OF } ss:

.....the attorney for the.....in the above entitled action, being duly sworn, says that the foregoing disbursements have been made in said action or may be necessarily made or incurred therein and that they are reasonable in amount.

Sworn to before me this.....
day of.....19 .

(Note. "Notice of Adjustment" to be found in Form I.)

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